

Missouri Attorney General's Opinions - 1969

Opinion	Date	Topic	Summary
3-69	Apr 15		Opinion letter to the Honorable Clinton Almond
4-69			Withdrawn
9-69	Mar 18	MOTOR VEHICLES. TRUCKS. WEIGHT REGULATIONS.	1. If the weight on a tandem axle does not exceed thirty-two thousand (32,000) pounds but the weight on one of the axles in the tandem group exceeds eighteen thousand (18,000) pounds there is a violation of Section 304.180, RSMo Cum. Supp. 1967. 2. Any one axle, however, positioned or attached, may not exceed the weight of eighteen thousand (18,000) pounds prescribed for a single axle. 3. A weight limitation of eighteen thousand (18,000) pounds on a single axle of a tandem group is not in conflict with or in excess of that permitted under the provisions of Section 127 of Title 23 of the United States Code (public law 85-767, 85th Congress). 4. A holding that, under Section 304.180, the weight of any one axle of a tandem group can lawfully exceed eighteen thousand (18,000) pounds would render the State of Missouri ineligible for apportionment of future interstate funds under Section 108(b) of the Federal Aid Highway Act of 1956.
10-69	Aug 19	CONSTITUTIONAL LAW. CONTRACTS. CREDIT LIFE INSURANCE. EMBALMERS. FUNERAL DIRECTORS. FUNERAL PLANS. INSURANCE. STATUTES.	Sections 436.010 through 436.080, RSMo Supp. 1967, neither prohibit nor authorize the sale of credit life insurance in connection with installment purchases of prearranged funeral plans. Sales of such insurance policies are permitted, provided that all statutory requirements relating to the sale of such insurance are met. Sections 436.010 through 436.080 govern the handling and investing of money collected only under prearranged funeral plans entered into after the effective date of those sections, October 13, 1965.
12-69	May 26		Opinion letter to the Honorable James A. Noland, Jr.
13-69	Jan 10	POLICE DEPARTMENTS. POLICE OFFICERS. CITIES, TOWNS, AND VILLAGES. CITY POLICE.	Graduation from or completion of courses offered by the Police Academy of Metropolitan St. Louis Police Department does not fulfill the requirements of Section 66.250, RSMo Supp. 1967.
15-69	Feb 3		Opinion letter to the Honorable Don Witt

18-69	Feb 18		Opinion letter to the Honorable Ralph Combs
21-69			Withdrawn
23-69	Nov 6	CIRCUIT COURT. CIRCUIT CLERKS. CIRCUIT COURT CLERKS AND RECORDER OF DEEDS. RECORDER OF DEEDS. VACANCIES.	(1) During a vacancy in the office of the clerk of the circuit court and pending the appointment of a successor by the Governor and qualification of such officer, the circuit court may appoint a temporary circuit clerk; (2) Such an appointment where the offices of circuit clerk and recorder are combined, also constitutes the person appointed by the court ex officio recorder as a matter of law; (3) Such clerk appointed by the circuit judge is entitled to the emoluments of the office during the period he serves as circuit clerk and recorder of deeds; (4) The person appointed by the Governor to fill such a vacancy is not entitled to any emoluments of office until such time as he duly qualifies for such office.
24-69	Mar 25	DRIVER'S LICENSES. LICENSES. SUPREME COURT RULES. CHANGE OF VENUE. APPEALS. DIRECTOR OF REVENUE.	That Section 564.444 RSMo Supp. 1967, is civil in nature. Supreme Court Rule 41.02 is explicit in directing that the Rules of Civil Procedure shall govern civil practice and procedure in the Circuit Courts. The Rules of Civil Procedure provide for change of venue and appeal. It is our opinion that the Director of Revenue can apply for a change of venue or take an appeal in accordance with the provisions of the Rules of Civil Procedure in matters of judicial review of an order of revocation of a drivers license because of refusal to submit to a breath test issued under the provisions of Section 564.444.
25-69	Mar 11	DIRECTOR OF REVENUE. DRIVERS LICENSE. JUDGMENTS. MOTOR VEHICLE SAFETY RESPONSIBILITY.	An unsatisfied judgment of a magistrate court warrants suspension of driving privileges of the defendant until it is satisfied, released, or until a period of ten years expires after rendition or revival of said judgment or from the date of the last payment on the judgment. Failure of the plaintiff to revive such judgment after three years in no way affects the suspension of driving privileges contemplated by the Motor Vehicle Safety Responsibility Law.
27-69	Feb 25	LIQUOR CONTROL. INTOXICATING LIQUOR. NONINTOXICATING BEER. LICENSES.	The State Director of Liquor Control has no authority to deny a license to a person to sell intoxicating liquor or nonintoxicating beer under Section 311.060, RSMo and 312.040, RSMo, because such person has been convicted of violating a city ordinance relating to the manufacture or sale of intoxicating liquor or nonintoxicating beer.
29-69	Aug 11	NATIONAL GUARD. MOTOR VEHICLES.	Section 304.265, RSMo, makes unlawful the operation by a member of the Missouri National Guard of trucks and truck-tractor trailers in possession of the Missouri National Guard unless such vehicles are equipped with rear fenders or mud flaps, regardless of whether the vehicles are owned by the State of Missouri or the United States.
30-69			

32-69	Feb 17		Opinion letter to Senator Donald L. Manford
34-69	Jan 28	GAMBLING DEVICES. GAMBLING. LOTTERIES. BINGO. KENO. LIQUOR LICENSE. LIQUOR.	Regulation No. 15(k) of the Supervisor of Liquor Control of Missouri prohibits any licensee from having any "Bingo" device upon his licensed premises.
35-69	Mar 18	SCHOOLS. TEACHERS. SABBATICAL LEAVE. PUBLIC SCHOOL RETIREMENT SYSTEM. STATE AID.	1. The power of a public school board to employ teachers includes the discretion to grant temporary leaves of absence with or without pay subject to the limitations of other applicable laws. 2. Leave of absence must be set out in writing and incorporated in the employment contract between the board and the teacher. The leave cannot be a gratuity, but must be in exchange for service rendered by the teacher during the contract period. 3. Leave agreements by school boards of St. Louis County must be in accord with requirements of Sections 168.191, RSMo Supp. 1967, which limits the terms of teaching contracts. 4. Public school teachers' retirement system contributions under Section 169.010, et seq., RSMo should be calculated during the teacher's leave of absence in the same manner as contributions are calculated during periods of actual service. 5. A temporary leave of absence of a teacher employed on a regular full-time basis does not affect the eligibility of the school district for state aid known as "Teacher Preparation Allowance" under subsection 2 of Section 163.031, RSMo Supp. 1967.
36-69	Jan 30	PROBATE JUDGES. MAGISTRATES. DISABILITY. VACANCY. APPOINTMENT OR TRANSFER OF JUDGES. SALARY.	Section. 482.120, RSMo, relating to the appointment of a judge of the magistrate court by the judge of the circuit court, and Section 451.180 relating to the appointment of a special probate judge by the Governor, are in conflict with Supreme Court Rule 11.05, which provides that the Supreme Court of Missouri make transfers to the probate and magistrate courts, and are null and void. A de facto judge appointed under either such section is not entitled to the compensation provided for the office. The de jure judge holding said office is entitled to the emoluments of the office.
38-69	Jan 7	PUBLIC RECORDS. RECORDER'S OFFICE. UNIFORM COMMERCIAL CODE.	Financing statements filed in recorder's office subject to public inspection.
41-69	Jan 8		Opinion letter to the Honorable W. E. Sears
46-69	May 20	LIBRARIES.	The Jefferson City Library Board is not authorized to pay lease rentals on buildings from the funds derived from a tax levy to erect public

			library buildings.
48-69	Apr 10	REAL ESTATE COMMISSION. LICENSES.	(1) The Real Estate Commission cannot grant a license to a person whose license has been revoked under Section 339.110, RSMo 1959; (2) The Real Estate Commission can grant a license to a person whose license has been revoked under Section 339.100, RSMo 1959, if such person makes proper application and meets the qualifications of Section 339.040, RSMo 1959.
49-69	Mar 3		Opinion letter to the Honorable Harry Wiggins
52-69	Jul 1	SCHOOLS. TRUSTS. CHARITY.	(1) The Board of Education of the Chillicothe R-2 School District is the "Chillicothe School Committee" as the term is used in the will of Florence Pendleton. (2) A public school board may act as trustee of a charitable trust, the purpose of which is an authorized function of the school district. (3) A public school district by use of private trust funds may promote the continuing education of its residents through non-interest loans for higher education. (4) Where a public school district is the trustee of a charitable trust, discriminatory limitations on the trust based on race, religion, national origin, or sex are void and unenforceable. However, such invalid provisions do not void a trust where the intent of the testator, as seen from the will itself, is to create a charitable trust in any event; but such trust is to be enforced without regard to the invalid provisions.
54-69	Feb 28		Opinion letter to the Honorable John H. Mittendorf
55-69	Mar 18	CHIROPRACTIC. RULES AND REGULATIONS.	That part of Rule 16.4(b) of the Personnel Advisory Board which provides that only physicians may verify certificates of sick leave for state employees is invalid, and to carry out the intention of the legislature the rule should also provide that a chiropractor is legally qualified to verify the certificate required for sick leave resulting from an illness he is legally authorized to treat.
56-69	Feb 3		Opinion letter to the Honorable Hunter Phillips
57-69	Nov 6	CONSERVATION COMMISSION. FISH AND GAME. LICENSES.	The Missouri Conservation Commission has the authority to regulate the method and manner of taking predatory animals and that Rule IV, Section 4.10 of the Wildlife Code of Missouri, 1969, is a lawful exercise of that authority.
59-69	Jan 21	COUNTIES. LEVEE DISTRICTS. DRAINAGE DISTRICTS. ROADS.	County liable for benefits to public roads in drainage or levee districts.
61-69			Withdrawn
63-69	Feb 11	CITIES, TOWNS AND	Votes in each area counted separately.

		VILLAGES. ANNEXATION.	
64-69			Withdrawn
65-69	Jan 30	WATER SUPPLY DISTRICTS. VACANCIES.	The three remaining members of the Board of Directors of the St. Louis County Water Supply District No. 2 should call a special election to fill the vacancies caused by the resignation of two members more than six months prior to the expiration of their terms.
66-69	Jan 30	EMERGENCY VEHICLES. EMERGENCY EQUIPMENT. MOTOR VEHICLES.	It is the opinion of this office that a privately owned vehicle, used in transporting emergency equipment such as iron lungs, oxygen and other emergency equipment, responding to emergency calls by doctors is not an ambulance or other emergency vehicle within the meaning of Section 304.022, RSMo 1959. Consequently, it may not display a red light or use a siren on such vehicle.
68-69	Mar 3		Opinion letter to the Honorable Winston V. Buford
69-69	Jan 8		Opinion letter to Dr. L. M. Garner
70-69	Mar 7		Opinion letter to the Honorable Richard J. Blanck
71-69	Apr 23		Opinion letter to the Honorable George J. Pruneau
72-69	Feb 24		Opinion letter to Dr. Earl E. Dawson
73-69	Jan 8		Opinion letter to the Honorable Charles B. Faulkner
76-69	Jan 30	EMINENT DOMAIN. UNITED STATES. TAXATION-REAL PROPERTY.	Filing of declaration of taking and deposit of estimated compensation in court vests title to land in United States government under Federal condemnation law (40 U.S.C.A. § 258 a) so as to remove land from tax rolls in succeeding calendar year.
77-69	Feb 4	NATIONAL FOREST RESERVE FUNDS. SCHOOL AND ROAD MAINTENANCE. DISTRIBUTED BY COUNTY COURT.	It is the opinion of this office that the county court of any county receiving funds from the United States under the National Forest Reserve Act shall distribute such funds to aid in maintaining the schools and roads of school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county upon any basis which, in its discretion, the court determines to be proper.
78-69	Feb 18		Opinion letter to Mrs. Olean Barton
79-69	Feb 27	COUNTY CLERKS. DEPUTY COUNTY CLERKS. FEES, COMPENSATION AND SALARIES.	The County Clerk of a third class county may employ as many deputies as he determines to be necessary. Paragraph 3 of Section 51.450 RSMo Supp. 1967 does not allow \$1000.00 for each deputy employed by the county clerk but does allow one flat sum of \$1,000.00 regardless of the number of deputies. Paragraph 2 of Section 51.450 RSMo Supp. 1967 permits the county court to allow an additional sum not to exceed \$1,000.00 for deputies and assistants hire. Such additional sum is not

			allowed for each individual deputy. County Clerks cannot be paid extra remuneration for performance of their official duties relating to casting up the votes given to candidates at elections.
80-69	Aug 7	AMBULANCES. COUNTY HOSPITALS. COUNTY COURTS. HOSPITALS. SPECIAL TAX LEVIES. COOPERATIVE AGREEMENTS.	A county hospital organized under the provisions of Section 205.160, RSMo, et seq., may contract with the county court of the county wherein they are located for such ambulance services as the hospital board of trustees deem necessary and appropriate to the needs of the hospital and the hospital board of trustees may likewise as a part of such contract provide facilities for the housing of the ambulance vehicles.
81-69	Mar 28		Opinion letter to the Honorable Charles S. Broomfield
82-69	Mar 4	COUNTY AUDITORS. SALARIES. ADDITIONAL COMPENSATION.	The right of the County Auditor to payment of the additional compensation provided by Section 55.097, RSMo Cum. Supp., is conditioned upon the actual performance of the duties imposed by Section 55.175, RSMo Supp. 1967, including the making of an annual audit of the accounts and records of the county health center, county planning and zoning commission and the county building commission. In counties where these facilities do not exist, the auditor cannot meet the conditions imposed by the statute and therefore cannot acquire a right to payment of the additional compensation provided in Section 55.097.
83-69	Oct 14		Opinion letter to Mr. Richard E. Snider
85-69			Withdrawn
89-69	Feb 18		Opinion letter to the Honorable James C. Kirkpatrick
90-69	Jan 29		Opinion letter to Mr. Carl D. Gum
92-69	Jan 8		Opinion letter to the Honorable Robert D. Scharz
93-69	Sept 9	SCHOOLS. INSURANCE.	1. A school board has no authority to purchase liability insurance to cover its own negligent actions; 2. A school board is given authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district; 3. The purchase of liability insurance by a school board to be paid as compensation to its employees does not waive the sovereign immunity of a school board.
94-69	Jan 31		Opinion letter to the Honorable Thomas A. Walsh
95-69			Withdrawn
98-69	Mar 5		Opinion letter to the Honorable Walter E. Allen
99-69	Jan 10		Opinion letter to Mr. George W. Flexsenhar

102-69	July 7		Opinion letter to the Honorable John Crow
103-69	Feb 3		Opinion letter to the Honorable James C. Kirkpatrick
104-69	Feb 28		Opinion letter to the Honorable James. F. Flynn
105-69	Feb 25	ASSESSORS. COUNTY ASSESSORS.	County assessor can verify the assessor's books as provided by Section 137.245, R.S.Mo., when such assessor's books have been prepared by data processing equipment operators from information furnished by the assessor.
106-69	June 19	CIRCUIT CLERK. JUVENILE COURT. JUVENILE CLERK. COMPENSATION.	The circuit clerk of a second class county is not entitled to any fee or salary other than his regular salary for acting as clerk of the juvenile court.
108-69			Withdrawn
109-69	Feb 18		Opinion letter to the Honorable William T. Brooking, Jr.
110-69			Withdrawn
112-69	Feb 11	FEES AND SALARIES. TOWNSHIPS. COMPENSATION AND SALARIES. TOWNSHIP TREASURER.	Section 65.230(2), RSMo 1959, authorizes compensation to a township treasurer of two per cent on all funds handled by him up to the amount of \$1,000.00, and one per cent on all funds in excess of such amount. He is not entitled to receive two per cent on funds received by him, and another two per cent for disbursing the same funds.
113-69	Feb 28		Opinion letter to the Honorable Arlie H. Meyer
114-69	Sept 23	ASSESSMENTS. CITIES, TOWNS & VILLAGES. SCHOOLS. COOPERATIVE AGREEMENTS.	1. The St. Joseph School District does not have authority to expend its funds to contract with a professional firm to reevaluate real property within its boundaries. 2. The St. Joseph School District does not have the authority to enter into a cooperative agreement with the City of St. Joseph and Buchanan County in undertaking reevaluation of real property which is a common source of revenue to all three. 3. The county of Buchanan has the authority to contract with a private professional firm to undertake the reevaluation of real property within the County as a means of assisting the Assessor, and authority to enter into a cooperative agreement with the City of St. Joseph, but not with the St. Joseph School District. 4. Such a contract with a private professional firm may be financed with funds from general revenue, if available; a levy approved by the voters under section 137.073, RSMo Supp. 1967, is not mandatory. If a levy is approved as provided in Section 137.037, such levy must be included in the general levy for county purposes provided in section 11(b) of Article X of the Constitution of Missouri.
115-69			

115-69	Aug 14	COUNTIES. COUNTY COURT. TAXATION. BONDS.	A county court is authorized to expend such amount of tax revenues raised to create a bond service fund for the county's unissued hospital bonds as is needed to pay obligations incurred in furtherance of the purpose for which the bonds were authorized. Tax proceeds so expended must be replaced as soon as the hospital bonds are issued. A county court is authorized to replace these bonds with the bond proceeds.
116-69	May 29	LOBBYIST. LOBBYING. LEGISLATION.	The financial reports required by Section 105.470, RSMo Supp 1967, should disclose all expenditures made to, or in behalf of, a member of the General Assembly for the purposes of attempting to influence the passage or defeat of legislation by the General Assembly. It is further the opinion of this office that such financial reports need not include the amounts <u>received</u> by persons to be used by them for the purpose of attempting to influence the passage or defeat of legislation by the General Assembly, but need only list the actual expenditures made by these persons for the stated purpose. The salaries of these persons need not be reported.
120-69	Mar 20	INSURANCE. LIFE INSURANCE AND LIFE INSURANCE COMPANIES. SUPERINTENDENT OF INSURANCE.	A Missouri domiciled life insurance company organized under the provisions of Sections 376.010 through 376.675, RSMo, is not permitted to use the common stock of a wholly-owned subsidiary which has been organized or acquired pursuant to the provisions of Section 375.355, RSMo Supp. 1967, as a special deposit required under Section 376.170, RSMo 1959.
121A-69	Feb 3		Opinion letter to the Honorable James E. Godfrey
122-69	June 13		Opinion letter to the Honorable James E. Godfrey
123-69	Aug 7	COUNTIES. COUNTY COURT. AMBULANCE SERVICE.	(1) A county court can enter into a contract with an individual agreeing to pay such individual not to exceed \$5,000 during a year for ambulance services for which the individual is unable to collect from persons for whom he has furnished ambulance service if such individual submits said claims to county court for the amounts he is unable to collect. (2) The county court of a third class county does not have the authority to make a deposit of county funds in an individual's name, allowing him to draw upon said account for payment of ambulance services for the amount he is unable to collect from persons for whom he has furnished ambulance service.
124-69	Mar 3		Opinion letter to the Honorable Lawrence J. Lee
125-69	Apr 16		Opinion letter to the Honorable James N. Foley
126-69	Mar 28		Opinion letter to the Honorable R. Jaynes

127-69	Aug 21	COMPENSATION. MAGISTRATES. MAGISTRATE CLERK. CLERKS.	A duly appointed magistrate clerk continues to hold office in the interim following the death of the appointing magistrate and until the appointment of a clerk by a magistrate appointed by the governor to fill the vacancy and that the clerk is entitled to compensation for such period.
130-69			Withdrawn
131-69	Aug 12		Opinion letter to the Honorable Harold L. Volkmer
132-69	Mar 4		Opinion letter to the Honorable Albert F. Turner
134-69			Withdrawn
135-69	Feb 28		Opinion letter to the Honorable Harry Wiggins
136-69	Apr 30		Opinion letter to the Honorable G. William Weier
139-69	Aug 29		Opinion letter to the Honorable Alvin B. Walker
141-69	Aug 11	COUNTY COURT. ROADS AND BRIDGES.	A county court may use the road and bridge fund to purchase real estate in the county for the purpose of storing machinery used to keep up and build county roads and bridges.
142-69	Aug 4		Opinion letter to Robert L. Hyder, Esq.
143-69	June 12	CONSTITUTIONAL LAW. PARKS. RECREATION GROUNDS. CITIES, TOWNS AND VILLAGES. TAXATION.	The City of Rolla may, if approved by the voters, levy and collect an additional twenty cents special tax for recreational purposes under Section 64.755, RSMo Supp. 1967, in addition to a tax levy of eighty cents for municipal purposes under Section 94.060, RSMo 1959, and twenty cents for park purposes under Section 90.500, RSMo Supp. 1967.
145-69	June 19	CONFLICT OF INTEREST. CIRCUIT CLERK.	Entering into a contract of employment by the Circuit Clerk with a bank where the Circuit Clerk's account is on deposit is a violation of Section 105.495, RSMo Cum. Supp. 1967, a section of the conflict of interest law.
146-69	Feb 18		Opinion letter to the Honorable Lowell McCuskey
147-69	Feb 28	SCHOOLS. JUNIOR COLLEGE DISTRICT. ELECTIONS.	Section 178.840, RSMo Supp. 1967, does not permit, authorize or direct the Junior College District of Metropolitan Kansas City, Missouri, to hold an election on the first Tuesday in April 1969, for the election of a trustee.
148-69			Withdrawn
149-69	July 1	CIVIL DEFENSE. MILEAGE.	The Boone County Court, in the exercise of its control of the fiscal affairs of the County has authority to reimburse the County Civil

		EXPENSES.	Defense Director for all actual and necessary travel expenses incurred in the performance of public duties, which would include travel to attend civil defense conferences outside the political subdivision and outside the State of Missouri.
152-69	Sept 5		Opinion letter to the Honorable Dennis C. Brewer
153-69	May 2		Opinion letter to the Honorable Robert L. Prange
157-69			Withdrawn
158-69			Withdrawn
159-69	Aug 7	COUNTY BUDGET LAW. COUNTY FAIRS. TAXES. ELECTIONS.	Revenues under section 262.500 to 262.540 RSMo 1959, are under the Budget Law. These revenues must be divided into separate funds--one for premiums which is not a revolving fund. The remaining fund may be used for premiums or for fairgrounds unless the latter use is required in the tax election proposition. Surplus from any year may be used only for premiums or advertising.
162-69			Withdrawn
163-69	Mar 10		Opinion letter to the Honorable Eugene F. Mazzuca
164-69	Mar 10		Opinion letter to the Honorable Eugene F. Mazzuca
167-69	July 10	SCHOOLS. SCHOOL BOARDS.	(1) School districts may form and contribute funds to a voluntary association consisting of several school districts, provided that the activities of the association are within the powers of the participating school districts. (2) An association so formed may employ and compensate a person with the title of executive director, out of funds contributed by the participating districts. (3) The said association may take part in activities in support of or in opposition to legislation affecting the participating school districts.
168-69	Aug 7	RESIDENCE. KANSAS CITY AREA. TRANSPORTATION DISTRICT. AUTHORITY.	Residence requirements for a commissioner of the Kansas City Area Transportation District Authority as the representative of a particular county are met by a person who is legally entitled to vote in such county. Voting residence depends on the intent of an individual and such intent is determined by his acts as well as his statements.
170-69	Apr 24	SAFETY RESPONSIBILITY UNIT. MOTOR VEHICLES. ACCIDENT REPORTS.	The operator of a motor vehicle on the public highways who loses control and goes off the highway and causes damage to another's property in excess of \$100 must file a report under Section 303.040, RSMo 1959.
172-69	Dec 5		Opinion letter to the Honorable E. J. Cantrell
173-69	June 9	INSURANCE.	Proposed "Indemnity Agreement" in which restaurant operators

			operating under franchise from common franchisor pay into a fund for the purpose of indemnifying each other against specified losses constitutes "insurance contract" which may not be entered into without complying with insurance laws of the State of Missouri.
175-69			Withdrawn
177-69	Mar 18	PENSIONS. RETIREMENT. CONSTITUTIONAL LAW.	A proposed amendment to a Jefferson City ordinance providing for an increase in pension payments to retired Jefferson City firemen would be in violation of Section 13, Article I, of the Missouri Constitution, if such action would involve taking a portion of the existing retirement fund to pay the increase to retired members.
178-69	Aug 29		Opinion letter to the Honorable Roy L. Carver
179-69	Dec 2	EMINENT DOMAIN. JUST COMPENSATION. BONDS. SECURITIES. CONDEMNATION.	Bonds do not satisfy the Missouri constitutional requirement for just compensation for property taken by the state by condemnation.
181-69	Apr 29	COUNTY COUNSELOR. ATTORNEYS.	(1) An assistant county counselor of a first class county can also be employed as counsel by a sewer district formed under Sections 204.250 through 204.470, RSMo Supp. 1967; (2) An assistant county counselor of a first class county may also be employed as administrative assistant of the highway engineer of that county, so long as such person in no way renders legal services in his capacity as administrative assistant.
182-69			Withdrawn
186-69			Withdrawn
187-69	Mar 20		Opinion letter to Mr. Edwin M. Bode
188-69	Sept 16	PENSIONS. RETIREMENT. CONSTITUTIONAL LAW.	An individual who is sixty years of age, with fifteen years of creditable service in the State Retirement System, but who has not retired and is no longer a contributing member of the system, may not receive an increase in retirement benefits as provided for in House Bill 480 of the Seventy-Fifth General Assembly if such person does not re-enter state employment.
189-69	Oct 10		Opinion letter to the Honorable Allen S. Parish
190-69			Opinion letter to the Honorable Donald L. Manford
191-69	Aug 7	COUNTIES. PROBATE COURTS.	County must bear expense of authorized photographic reproduction and destruction of probate court records.
192-69			

192-69	Apr 22	COUNTY COLLECTOR. FEES, COMPENSATION & SALARIES. COMPENSATION.	A county collector in a third class county not having township organizations is authorized to collect and retain a commission under Section 52.260, RSMo Supp. 1967, for collecting taxes levied under Section 278.250, RSMo Supp. 1967.
193-69	June 12	ROADS AND BRIDGES. COUNTY COURT. TAXES (ROADS AND BRIDGES). SEWER DISTRICTS.	Revenue derived from a county tax levy under Section 137.555, RSMo can be used only for road and bridge purposes and, therefore, cannot be expended for Jackson County Sewer District purposes.
194-69			Opinion letter to the Honorable Robert L. Dunkeson
195-69	May 15	LOTTERIES. REFERRAL SELLING.	Referral selling operation described herein in which the purchaser participant is involved in earning some of his commissions through the enrollment of other purchasers is nevertheless a lottery.
196-69	Sept 25	THIRD AND FOURTH CLASS COUNTIES. OWNING REAL ESTATE IN OTHER COUNTIES. SALE OF LAND BY SHERIFF. REAL ESTATE.	The sheriff of any county in which real estate is located which is owned by another nonadjoining county of the third or fourth class in violation of section 49.285(1), must take possession of the land and sell it in the manner prescribed by section 49.285(1) unless otherwise ordered by a Circuit Court under section 49.285(2).
198-69	July 10	COUNTY CHARTER COMMISSION. COUNTY OFFICERS. NECESSARY GOVERNMENTAL EXPENSES. COUNTY LIABILITY OR REIMBURSEMENT FOR EXPENSES. CONSTITUTIONAL LAW.	The Clay County Court is authorized to expend county funds to meet the necessary expenses incurred by the Clay County Charter Commission in the performance of its official duties. Necessary expenses do not include fees for professional advice and services meals consumed, clothing depleted or commutation expenses incurred by commission members. Nor may the county use its fund in any way to compensate members of the commission for their services.
199-69	June 24		Opinion letter to the Honorable Herman Julien
200-69	May 20	COUNTY COURT. COUNTY EMPLOYEES.	If only the presiding judge and one other judge of the County Court are present, the presiding judge may proceed to hire an employee for the county although the other judge votes against such hiring. When all judges are present, and one judge is disqualified to act by reason of his

			relationship to a prospective employee, the presiding judge may hire said employee although the other judge may vote against said hiring.
204-69	Sept 23		Opinion letter to Mr. George W. Flexesenhar
206-69			Withdrawn
209-69	June 5	STATE HIGHWAY DEPARTMENT. OVERTIME COMPENSATION.	Overtime compensation can be paid by the Missouri State Highway Commission to maintenance employees who are required to work overtime for snow and ice removal and for other emergency highway work such as repair or reconstruction of washed out bridges.
212-69	Aug 11	HOUSING AUTHORITY. OFFICERS.	A tenant, is not eligible to be appointed to the office of commissioner in a municipal housing project created under provisions of Chapter 99, RSMo 1959.
213-69	Apr 29	MOTOR VEHICLES. CRIMINAL LAW. DRIVERS' LICENSES.	If a person operates a motor vehicle when his driver's license is suspended under Chapter 303, RSMo, "The Safety Responsibility Law," he is in violation of Section 303.370, RSMo 1959, and not Section 302.321, RSMo Supp. 1967.
214-69	June 5	PHARMACISTS. JURIES.	It is the opinion of this office that pharmacists are exempt from jury duty, under the provisions of Section 338.160, RSMo.
215-69	Oct 16	PROSECUTING ATTORNEYS. CONSTITUTIONAL LAW. UNITED STATES COMMISSIONER.	Under Article VII, §9 of the Constitution of Missouri, a person may not hold the office of prosecuting attorney and that of United States Commissioner at the same time.
216-69	Aug 4		Opinion letter to the Honorable A.J. Seier
220-69	June 9	POLLING PLACES. ELECTIONS. COUNTY CLERKS. ELECTION BOARDS.	County clerks, boards of election commissioners or other proper election officials are not required to designate tax supported public buildings to be used as polling places under the provisions of Section 111.257 RSMo. Supp. 1967.
222-69	Apr 17	STATE BOARD OF EDUCATION. FEDERAL-STATE AGREEMENTS. MANPOWER DEVELOPMENT AND TRAINING ACT.	Review and certification of Missouri State Board of Education's Agreement with the United States Department of Health, Education and Welfare under the Manpower Development and Training Act of 1962, as amended.
223-69	Oct 27	DIRECTOR OF REVENUE. STATE TREASURER.	(1) Ninety-eight per cent of the proceeds of intangible personal property tax which are to be returned to the local political subdivisions is not to be transmitted to the State Treasurer: (2) Treasurer of

		INTANGIBLE PERSONAL PROPERTY TAX. INTEREST.	Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri; (3) Director of Revenue is an insurer of that portion of the intangible personal property tax which he retains and is bound to turn over the proceeds to the proper local official on the date as specified by statute. That in discharging this duty he may deposit the portion of the revenue which ultimately is to be returned to the counties for safe-keeping and that he may, in so doing so, deposit these moneys in 'time deposit' accounts which draw interest. In the event that the Director chooses to avail himself of the opportunity to place this money at interest, the interest earned is to be returned to the counties in proportion to the amount of revenue produced by that county.
224-69	June 6		Opinion letter to the Honorable L.M. Garner, M.D., M.P.H.
225-69	May 13	CITIES. FIRST CLASS CITIES. INCORPORATION. ADOPTION OF CHARTER. CONSTITUTIONAL CHARTER CITIES.	An unincorporated area incorporating as a first class city cannot at the same time adopt a charter form of government, but may hold elections to present the question of adoption of a charter only after organizing as a first class city.
228-69	June 12	CAPITOL BUILDING.	Custodian of House has control only over offices of members and of rooms on the third and fourth floors of West side of the Capitol.
229-69	Nov 6		Opinion letter to the Honorable John A. Grellner
232-69	Sept 25		Opinion letter to the Honorable William R. Royster
233-69			Withdrawn
234-69	Apr 18		Opinion letter to County Court
236-69			Withdrawn
239-69	May 21		Opinion letter to the Honorable Thomas D. Graham
240-69	Aug 1		Opinion letter to the Honorable William R. Royster
241-69	May 27	PUBLIC RECORDS. DEPARTMENT OF REVENUE. LICENSES.	The records concerning motor vehicle registration are public records under Section 301.350, RSMo 1959 and Section 109.180, RSMo Supp. 1967, and shall be kept open to public inspection during reasonable business hours.
244-69			Withdrawn
246-69	Sept 25	POLL BOOKS.	A six-director school district election express statutory language

		ELECTIONS. SCHOOLS.	requires that poll books be used and that at the close of each election one of the poll books shall be transmitted to the clerk of the county court and the other retained in the possession of the judges of election open to the inspection of all persons.
247-69	May 20		Opinion letter to Mr. Gene Sally
249-69	Sept 4	SCHOOLS. TAXATION (SCHOOLS).	A school district may adopt, by the necessary majority required by the Constitution, a proposal to further increase the rate of taxation for a given year or years beyond the rate previously authorized by popular vote for said year or years. Should a proposal for further increase in the rate fail to get the necessary majority required, the rate existing at the time of said vote on the proposed further increase is not repealed thereby, but continues in effect for the term previously authorized by vote.
253-69	Sept 9	ELECTIONS. VOTERS.	Section 78.550 only prohibits candidates and other interested persons from hauling voters to the polls.
254-69	Aug 7	AMBULANCES. COUNTY COURTS. FOURTH CLASS CITIES. SPECIAL TAX LEVIES. HOSPITALS.	(1) A county operating an ambulance service under Section 67.300, RSMo Supp. 1967, may submit to the voters, under Section 137.065, RSMo 1959, a proposed increase in county revenue tax for the maintenance of such service; (2) A fourth class city operating an ambulance service under Section 67.300, RSMo Supp. 1967, may levy a special tax to pay for such service under the provisions of Section 94.260, RSMo 1959; (3) The electors of a fourth class city may vote an increase in the rate of taxation under Section 94.250, RSMo 1959, to finance an ambulance service authorized by Section 67.300, RSMo Supp. 1967.
256-69	June 24	COUNTY COURT. JUDGE DISTRICTS. POPULATION. HOW EQUALIZED.	In dividing county into county court judge districts contiguously located, and as near equal in population as practicable, under Section 49.010, RSMo 1959, county court in equalizing population of districts is required by Section 1.100, RSMo 1959, to use last preceding census report of United States for county.
257-69	June 26	MUNICIPAL CORPORATIONS. POLICE.	Independence, a Constitutional Charter City is not prevented by state law from empowering the Chief of Police to commission reserve policemen.
258-69	Aug 28	COUNTY CLERK. ELECTIONS. REGISTRATION.	The County Court of Callaway County may properly reimburse the County Clerk for expenses actually and necessarily incurred by him in performing official duties required to be performed under the County Registration Law (Chapter 114, RSMo.).
260-69			Withdrawn
261-69	June	CITIES.	Statutes imposing liability on first and second class cities for riot

	12		damage do not apply to Constitutional Charter City.
265-69	Oct 30	CONSTITUTIONAL LAW. SCHOOLS.	A public school board may not allow the use of public school property by the Ministerial Alliance to conduct religious training.
267-69	Sept 9	MOTOR VEHICLES. COMMERCIAL MOTOR VEHICLES.	A station wagon used to transport tools used in repair work is not a commercial motor vehicle.
270-69	Dec 16		Opinion letter to the Honorable Ray Lee Caskey
271-69	Oct 9	TRUTH IN LENDING. DIVISION OF FINANCE. CREDIT.	Federal Truth In Lending Act supersedes Missouri Credit Law where disclosures would be inconsistent with federal system; other provisions of Missouri law remain in force.
272-69	Sept 17		Opinion letter to the Honorable C. W. Culley
273-69	June 26	ARREST. HIGHWAY PATROL. MOTOR VEHICLES.	Members of the Missouri State Highway Patrol, with the exception of the director of radio and radio personnel, are authorized by Sections 43.195 and 564.443, RSMo Supp. 1967, to arrest without a warrant for a misdemeanor not committed in their presence, upon reasonable grounds, for the offenses mentioned in these statutes. The one and one-half hour limitation imposed by Section 564.443, RSMo Supp. 1967, does apply to arrests for violations of Section 564.440, RSMo Supp. 1967 (driving while intoxicated) but does not apply to arrests for all other motor vehicle law violations under Section 43.195, RSMo Supp. 1967.
274-69	Aug 22		Opinion letter to Mr. Howard L. McFadden
275-69	July 1		Opinion letter to the Honorable Earl L. Schlef
277-69	June 5		Opinion letter to the Honorable Max B. Benne
278-69			Withdrawn
279-69	June 26	STATE AUDITOR. STATE TREASURER. DEPARTMENT OF REVENUE.	The State Auditor is required under law to audit the Office of the State Treasurer at least once annually and is required to examine and post-audit the Department of Revenue not less than once every two years.
281-69	July 3	SOIL AND WATER. CONSERVATION. DISTRICTS. WATERSHED PROTECTION AND FLOOD PREVENTION SUBDISTRICTS.	Section 278.290, RSMo Supp. 1967, which requires a waiting period of more than five years for disestablishment of Watershed Protection and Flood Prevention Subdistricts has no application to the disestablishment of Soil and Water Conservation Districts; disestablishment of such districts is governed solely by Section 278.150, RSMo Supp. 1967, which permits disestablishment at any time.

		DISESTABLISHMENT.	
283-69	Aug 28	CITIES, TOWNS & VILLAGES. SEWERS. MUNICIPAL CORPORATIONS. TAXATION.	Third class city with existing sewer and disposal plant may establish general sewer system under 88.832 RSMo 1959, and the city council may levy the tax authorized thereunder. Such tax may be in excess of the constitutional limit for general municipal purposes.
285-69	Aug 13		Opinion letter to the Honorable Harold J. Esser
286-69	Oct 23	VOTING. ELECTIONS. ELECTION JUDGES.	In a county which has provided for voter registration, under the provisions of Chapter 114, RSMo, "The Local Option Registration Law": (1) That pursuant to Section 114.220(3), RSMo Supp. 1967, a person registered in a precinct in which he offers to vote, may not be challenged on the day of election solely on the basis that his residency is actually in another precinct; (2) It is further the conclusion of this office that the requisites to registration set out in Section 114.050, RSMo 1959, except those of precinct residency, may be inquired into by challenge on the day of election.
287-69	Oct 7	ROADS AND BRIDGES. ROAD DISTRICTS. SPECIAL ROAD DISTRICTS.	A commissioner of a special road district may not be employed as a laborer for the road district.
288-69	June 20		Opinion letter to the Honorable A. J. Seier
290-69	June 27		Opinion letter to the Honorable Lawrence J. Lee
291-69	July 11		Opinion letter to the Honorable Dexter D. Davis
292-69	Sept 11	USURY. INTEREST.	It is the opinion of this office that the making of a loan by requiring the execution of a note to the principal of which is added simple interest on the entire amount of the loan at the rate of five per cent per annum for seven years, payable over a period of 84 months in equal monthly installments and secured by a first deed of trust on real estate constitutes usury in that the total interest payable on the note evidencing the debt would exceed eight per cent per annum as limited by Sections 408.030 and 408.050, RSMo.
293-69	June 25	GOVERNOR. EXECUTIVE DEPARTMENTS. PUBLIC OFFICERS.	The Governor can designate a person to perform the duties of the office of the head of an executive department, such person not being appointed to the office or claiming title to the office. Such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed.

294-69	July 11	STATE HIGHWAY COMMISSION.	Commission may establish position of Director, having general charge and supervision of state highway department, and may determine qualifications. Provisions of Section 226.040, RSMo 1959, relating to "chief engineer" are not effective to limit this authority.
295-69	Aug 29		Opinion letter to the Honorable Joe D. Holt
296-69	Aug 21	CORPORATIONS. PROFESSIONAL CORPORATIONS. ARCHITECTS & ENGINEERS.	A corporation organized under "The General and Business Corporation Law of Missouri," Chapter 351, RSMo 1959, may have as a purpose the practice of architecture and professional engineering. A corporation organized pursuant to "The Professional Corporation Law of Missouri," Chapter 356, RSMo Supp. 1967, may also have as a purpose the practice of architecture and professional engineering. A corporation organized pursuant to either of the above mentioned chapters must have a certificate of authority issued by the State Board of Registration for Architects and Professional Engineers before it may solicit, offer and render architectural or professional engineering services in this state. It is not necessary for the Board to revoke or cancel the certificate of authority of a corporation organized pursuant to Chapter 356 if that corporation should elect to continue doing business under Chapter 351.
297-69			Withdrawn
298-69	June 18	STATE BOARD OF EDUCATION. ELEMENTARY & SECONDARY EDUCATION ACT OF 1965. FEDERAL STATE AGREEMENTS.	Review and, certification of application of the State Board of Education for Grant under Title V of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended.
301-69	June 18	STATE BOARD OF EDUCATION. VOCATIONAL EDUCATION ACT. FEDERAL-STATE AGREEMENTS.	Review and certification of State Plan of State Board of Education under the Vocational Education Act of 1963, as amended.
302-69	Sep 24		Opinion letter to the Honorable Frank L. Mickelson
303-69	Oct 9	VITAL STATISTICS. HEALTH. DIVISION OF HEALTH. DEATH CERTIFICATES. FORGERY.	Funeral directors who make copies of death certificates prior to filing with the local registrar and with the Division of Health or funeral directors who make copies of certified copies of death certificates are in violation of the provisions of Section 193.380, RSMo Supp. 1967.

304-69	Aug 19		Opinion letter to the Honorable Lawrence J. Lee
305-69	Sept 18	MISSOURI STATE SOIL AND WATER DISTRICTS COMMISSION. NOTICE OF ELECTION TO LOCAL BOARDS OF SUPERVISORS.	Elections for the members of boards of soil and water district supervisors must be preceded by legal notice of the time, place, and purpose of the election.
306-69	Aug 21	SEARCH WARRANTS. POLICE. CITIES, TOWNS & VILLAGES.	Supreme Court Rule 33.02 controls the execution of search warrants. By allowing execution by "peace officers," it thus authorizes officers of a municipal police department in cities of the third class to execute search warrants.
307-69	June 27		Opinion letter to the Honorable Charles E. Valier
308-69	Aug 22		Opinion letter to the Honorable Haskell Holman
309-69	Aug 28	ROADS & BRIDGES. SPECIAL ROAD DISTRICTS.	1. The commissioners of a special road district organized under the provisions of Section 233.170, RSMo 1959, and located within a fourth class county do not have the authority to make street improvements within an incorporated city of the fourth class. 2. A county court in a fourth class county is authorized to expend money derived from the special road and bridge tax levy under Section 137.555, RSMo 1959, or from the general revenue tax where such is available on the repair and upkeep of city streets in a fourth class city located within a special road district where such city streets form a part of a continuous county road system, but it cannot spend money on a bridge located within a special road district, whether said bridge lies within or without city limits.
311-69	Aug 25	MOTOR VEHICLE. COMMERCIAL MOTOR VEHICLE.	A motor vehicle designed as a passenger carrying vehicle but regularly used to transport freight and merchandise is required to be registered as a commercial motor vehicle.
314-69	Sept 16	PUBLIC WATER SUPPLY DISTRICTS. EXTENSION OF SERVICES.	The public water supply system can refuse to extend services because of anticipated excessive rates if it be affirmatively shown that the refusal was a result of a reasonable and impartial administrative determination.
315-69	Sept 24		Opinion letter to the Honorable John J. Johnson
316-69	Dec 16	TOWNSHIPS. BONDS. TOWNSHIP COLLECTOR.	A township board may consent to pay the cost of a surety bond of the township collector. Such consent is discretionary with the township board and if it is not given the township collector must pay the cost of such bond whether it be a personal or surety bond.
317-69	June	FEDERAL-STATE	Review and certification of State Application (June 18, 1969) to

	30	AGREEMENTS. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965. STATE BOARD OF EDUCATION.	Participate in Title III of Public Law 89-10, (Public Law 90-247, Section 131, Amendments to Title III of the Elementary and Secondary Education Act of 1965).
319-69	Sept 15	UNFAIR MILK SALES PRACTICES ACT.	A supermarket which demands and receives ninety days credit from dairy suppliers would be in violation of Section 416.440(3), RSMo 1959, if the nature of said credit demand is that of a discriminatory gift not available to all purchasers nor extended by all suppliers and if the effect thereof is to divert trade or injure competition.
320-69	July 3		Opinion letter to the Honorable James C. Kirkpatrick
321-69			Withdrawn
322-69	July 10	AIR POLLUTION.	(1) The state does not have the power under Chapter 203, RSMo, to force a municipality to pass an ordinance on air pollution; (2) if a municipality does not enact an ordinance on air pollution, the individual council members are not in violation of state law and cannot be punished in regard thereto; (3) if city ordinances are passed in regard to air pollution the city must apply for an exemption from the Missouri Air Conservation Commission under Section 203.150(1), RSMo Supp. 1967, before such ordinances can be enforced; if an exemption is granted but such ordinances are not being enforced the exemption will be revoked under the provisions of Section 203.150(4), RSMo Supp. 1967, but no other penalties can be inflicted upon either the municipality or the city councilmen by the Air Conservation Commission.
323-69	Sept 11		Opinion letter to the Honorable Gladys Marriott
324-69	Oct 9	CITIES, TOWNS & VILLAGES. CITY COUNCIL. QUORUM.	A legal quorum of the Board of Alder men of the City of Frontenac a fourth class city was not destroyed when three aldermen left a special meeting of the Board of Aldermen with the purpose of preventing a vote on a resolution and that the resolution, which received more than a majority of the votes cast, was legally adopted.
325-69			Withdrawn
332-69			Withdrawn
333-69	Nov 18	CITIES, TOWNS AND VILLAGES. POLICE COURTS. MUNICIPAL COURTS.	(1) A jury in a municipal court in a fourth class city in a second class county should be selected as provided in Chapter 499, RSMo, when no written request has been made by a magistrate as provided for under Section 495.040, RSMo Supp. 1967. (2) The number of jurors for a jury

			in a municipal court in a fourth class city is to be determined as provided for under Section 543.210, RSMo.
334-69			Withdrawn
337-69	Oct 6	CONSTITUTIONAL LAW. STATE COLLEGES. SCHOOLS.	A state college or university does not violate constitutional provisions by giving credit for course taught by representative of religious denomination, so long as university premises or facilities are not used.
339-69	July 26		Opinion letter to the Honorable James C. Kirkpatrick
340-69	July 26		Opinion letter to the Honorable James C. Kirkpatrick
341-69	July 26		Opinion letter to the Honorable James C. Kirkpatrick
342-69	July 26		Opinion letter to the Honorable James C. Kirkpatrick
343-69	July 26		Opinion letter to the Honorable James C. Kirkpatrick
344-69	July 26		Opinion letter to the Honorable James C. Kirkpatrick
345-69	Sept 2	CONFLICTS OF INTEREST. SCHOOLS.	A resident of one school district who is employed as a full time teacher in another school district can serve in the position of school board member in the district in which he resides without violating the provisions of the Conflict of Interest Law, Sections 105.450 to 105.495, RSMo Supp. 1967.
346-69	Aug 29		Opinion letter to Mr. George J. Eckmann
347-69	Aug 26	MOTOR VEHICLES.	A motor vehicle designed and assembled as construction equipment prior to sale at retail is exempt from registration.
348-69	Oct 21	PROSECUTING ATTORNEYS. DIVISION OF WELFARE. JUVENILE COURTS.	It is the duty of the prosecuting attorney in a fourth class county to represent the Division of Welfare in adoption proceedings involving a child whose legal custody they have accepted.
349-69	Sept 29		Opinion letter to the Honorable Melvin Vogelsmeier
350-69	Sept 30	COUNTY OFFICERS. COUNTIES. MILEAGE. EXPENSES.	A county court may in its discretion reimburse county officers for travel expenses necessarily and indispensably incurred in the performance of the duties of their offices.
351-69	Sept 30	COUNTY OFFICERS. COUNTIES. MILEAGE. EXPENSES.	A county court may in its discretion reimburse county officers for travel expenses necessarily and indispensably incurred in the performance of the duties of their offices.
353-69	Aug 26	SCHOOLS.	Section 168.116 of House Bill 120 of the 75th General Assembly which

		TEACHERS.	will become a law if approved by the Governor is constitutional and forbids only those activities by a school teacher included in the management of a campaign for the election or defeat of a member or members of a board of education by which he is employed.
354-69	Oct 27		Opinion letter to the Honorable G.W. Weier
355-69	Aug 19		Opinion letter to the Honorable Ted Salveter
356-69	Sept 30	COUNTIES. CONSTITUTIONAL LAW.	Article 1, §7, Constitution of Missouri prohibits public funds from being used to employ a full-time chaplain for the Jackson County Jail.
358-69	Sept 9	COMPENSATION. MAGISTRATES. RETIREMENT.	A magistrate who retired on her sixty-fifth birthday prior to the enactment of 476.456 by House Bill 216 of the Seventy-Fifth General Assembly after having served twenty-two years as a magistrate is entitled to the benefits afforded by Section 476.450 and can elect to become a special commissioner and receive compensation of one-third the compensation provided by law from the office from which she has retired.
359-69			Withdrawn
360-69	Aug 4		Opinion letter to Dr. Ben Morton
361-69	Aug 21	NURSING HOME DISTRICTS.	A nursing home district may not annex territory of another nursing home district.
362-69	Sept 25	CITIES, TOWNS AND VILLAGES. SCHOOLS. ANNEXATION.	1. Pursuant to the provisions of Section 162.421, RSMo Supp. 1967, the children in areas proposed to be annexed to the City of Columbia in October, 1969, become residents of the Columbia School District on July 1, 1970, and thus will then be eligible to attend the schools of that district, if the proposed annexation is approved. 2. The property in the annexed areas will be subject to the Columbia School District 1970 tax levy, if the proposed annexation is approved. 3. The 1969 taxes are to be paid to the school districts containing the annexed areas and are to be considered in the settlement apportioning the property and obligations of the districts from which land was taken, according to the procedure provided in Section 162.031, RSMo Supp. 1967, if the proposed annexation is approved.
363-69	Sept 5		Opinion letter to Mrs. Olean Barton
364-69	Oct 16	MOTOR VEHICLES. LICENSES. LOCAL COMMERCIAL MOTOR VEHICLES.	A person, not a farmer, operating on a local commercial motor vehicle license, may not, by changing the operating address displayed on the vehicle or by any other means, legally operate outside of more than one municipality of operation and its twenty-five mile radius during the licensed period.
365-69			

365-69	Sept 30	SCHOOLS. TEACHERS. COUNTY JUDGES.	There is no constitutional or statutory provision disqualifying a person from running for the position of county judge because he is a teacher in a state college.
366-69			Withdrawn
368-69	Aug 7		Opinion letter to the Honorable Edward Stone
370-69	Aug 15		Opinion letter to the Honorable Edward Stone
371-69	Aug 29		Opinion letter to the Honorable John E. Parrish
372-69	Sept 25	DECLARATIONS OF CANDIDACY FOR CONGRESS.	Declarations of candidacy for Congress filed prior to the effective date of new apportionment legislation are a nullity and candidates who have attempted, to file before such date must file after the effective date of the new law in order to be placed on ballots.
373-69	Sept 11		Opinion letter to the Honorable G. William Weier
376-69	Sept 18	MUNICIPAL COURTS. POLICE COURTS. CITIES, TOWNS AND VILLAGES. CHAIRMAN OF BOARD OF TRUSTEES OF VILLAGE. MAYOR. ATTORNEY AT LAW.	House Bill 199 of the 75th General Assembly provides that as of October 13, 1969, in towns or villages in a county of the first class with a charter form of government and in cities of the fourth class in a county of the first class with a charter form of government: (1) The authority of the chairman of such town or village to hear and determine offenses against the ordinances of such town or village is abolished and provides in lieu thereof for the election or appointment of a municipal judge who will have such jurisdiction; (2) The office of the chairman of such towns or villages is not otherwise affected by the provisions of said bill and said chairman need not resign and his office is not vacated; (3) the authority of the mayors or police judges of cities of the fourth class in such county to hear and determine offenses against the ordinances of said cities is abolished and provides in lieu thereof for the election or appointment of a municipal judge who will exercise the jurisdiction formerly exercised by such mayors or police judges. Only the municipal courts in a first class county with a charter form of government are affected by the provisions of House Bill 199 and the bill in no way affects the jurisdiction of personnel of the city courts in any of the towns, villages or cities in other counties.
377-69	Sept 30	LIQUOR. CORPORATIONS.	A corporation which holds a majority interest in various other corporations cannot, either personally or through its various subsidiaries, hold more than three retail liquor-by-the-drink licenses.
379-69	Oct 27		Opinion letter to the Honorable Gene McNary
381-69	Sept 25	BAIL BONDS.	A member of the Selective Service Board of Jefferson County is not disqualified by his membership therein from acting as a professional surety on bail bonds under Supreme Court Rule 32.14.

384-69	Aug 28		Opinion letter to Mr. Hubert Wheeler
387-69	Oct 9	SHERIFFS. COMPENSATION. FEES. LEGISLATION. AUDITOR.	Senate Bill No. 165 of the 75th General Assembly relating to sheriffs of class three and class four counties provides for compensation for such sheriffs which is in addition to other compensation now provided by law and is effective October 13, 1969. Senate Bill No. 165, however, limits the total compensation of all sheriffs of counties of the third class with an assessed valuation of less than \$20 million to \$10,000 per year, excluding mileage.
389-69	Oct 23		Opinion letter to the Honorable James C. Kirkpatrick
392-69	Oct 14	CRIMINAL COSTS.	The state shall pay from the criminal cost appropriations for the cost of "a transcript" of criminal proceedings where the defendant is sentenced to five years or more in the penitentiary when the transcript is required by the judge, but that there is no authority for the state to pay for a copy thereof when required by the judge at the conclusion of the case.
396-69			Withdrawn
397-69	Sept 23		Opinion letter to Mr. James E. Schaffner
398-69	Nov 20		Opinion letter to Mr. George W. Flexsenhar
399-69	Oct 9	CIRCUIT CLERKS. COMMON PLEAS COURTS. RECORDERS OF DEEDS. COMPENSATION. FEES. LEGISLATION. AUDITOR.	With respect to House Bill 119 of the 75th General Assembly relating to the total compensation formula for the offices of recorder of deeds, circuit clerks, circuit clerk-ex officio recorder of deeds, in certain counties, and clerks of the common pleas courts, (1) The present full compensation of the recorder of deeds in class two counties can be readily ascertained; and if the compensation provided by House Bill 119 exceeds that provided by statutes applicable before the enactment of House Bill 119, such new compensation cannot be paid during the present term of office. (2) Circuit clerks of class two, three and four counties and the recorder of deeds in counties of the third class and clerks of the courts of common pleas will not receive the compensation provided by House Bill 119 during their present term if the compensation of such officers provided for by such bill is greater than the present statutory salaries of such officers. The additional compensation provided for the clerk of the Hannibal Court of Common Pleas under the provisions of Section 483.455 of House Bill No. 74 is also considered in computing his present salary.
400-69	Nov 11	SCHOOLS. STATE AID. SCHOOL TRANSPORTATION.	If a school board reasonably concludes that a student resides more than one mile from school via the shortest reasonably suitable route for pedestrian traffic and, furthermore, decides to provide public transportation for that student, the school district is entitled to state aid for the transportation of that pupil computed in accordance with

			Section 163.161, Senate Bills No. 1, 185 and 215, 75th General Assembly.
402-69			Opinion letter to the Honorable Guss C. Salley
403-69	Oct 9	PROSECUTING ATTORNEY. CONFLICT OF INTEREST. LEGISLATOR.	It is improper for a prosecuting attorney to represent landowners in condemnation actions filed by the State Highway Commission. It is illegal for prosecuting attorneys to represent individuals charged for violating the criminal laws of this state. A prosecuting attorney would violate the common law prohibition against holding conflicting and inconsistent public offices if he were to serve as a member of the State Highway Commission or the State Conservation Commission. A member of the General Assembly may represent landowners in condemnation actions filed by the State Highway Commission. A member of the General Assembly may also represent individuals charged with violation of state laws in courts having jurisdiction of criminal cases including both misdemeanors and felonies in the State of Missouri. For a member of the General Assembly to serve as a member of the State Highway Commission or the State Conservation Commission would be a violation of Article 3, §12 of the Constitution of Missouri.
404-69	Oct 7	JURISDICTION. MAGISTRATE COURTS. NONRESIDENTS.	Magistrate courts may obtain personal jurisdiction over nonresidents in those situations enumerated in §506.500, RSMo Supp. 1967, where magistrate courts have jurisdiction over the subject matter pursuant to other statutory provisions.
406-69	Oct 9		Opinion letter to the Honorable John C. Ryan
407-69	Sept 18	COUNTY CLERK. TAXATION.	It is the ministerial duty of a county clerk to extend taxes in the tax books based upon the tax rates certified to him by the school boards of the various school districts and he has no power to question the tax rates certified to him by such school boards or to refuse to extend the taxes because he determines that the school boards have allegedly certified to him tax rates not authorized by law.
408-69	Oct 9	COUNTY COURTS. SHERIFFS. COLLECTORS. COMPENSATION. LEGISLATION. AUDITOR.	(1) House Bill 116 of the 75th General Assembly which provides a mode of fixed compensation for judges of county courts of certain third class counties does not constitute an increase in the compensation of such officers and is effective October 13, 1969. The provision of said bill increasing the compensation of judges of the county courts of second class counties is not effective during the term of such judges. (2) House Bill No. 264 of the General Assembly authorizing a uniform allowance to sheriffs and deputy sheriffs does not constitute an increase in compensation during the term of such officers and is therefore effective October 13, 1969. Said bill also provides for additional compensation to sheriffs of class two counties

			<p>as compensation for additional services by such sheriffs and therefore is not an increase in compensation within the meaning of Section 13, Article VII, of the Constitution and is effective October 13, 1969. (3) House Bill No. 399 of the 75th General Assembly provides that the county collector of third and fourth class counties may retain an increased percentage of fees and commissions for deputy and clerical hire. Such increase is not to the benefit of such collectors, does not constitute an increase in compensation during the term of the collector or his deputies within the prohibition of Section 13, Article VII, of the Constitution and is effective October 13, 1969. Such increase may be used in full for the fiscal year ending February 28, 1970.</p>
409-69	Oct 9	COUNTIES. COUNTY OFFICERS. OFFICERS. COUNTY CLERKS. COUNTY COURTS. COMPENSATION. FEES. COUNTY FINANCIAL STATEMENT. AUDITOR.	<p>With respect to the provisions of Conference Committee Substitute for House Substitute for Senate Bill No. 13 of the 75th General Assembly, (1) Section 50.810 of said bill relating to preparation of county financial statements is effective January 1, 1971, and effective also on that date are the amendments to Section 51.300 which provides that the compensation of county clerks of county courts of the second, third and fourth classes be computed upon the variables of population and assessed valuation and that said compensation constitutes the entire compensation for services performed by said clerk except for fees for the issuance of fish and game licenses or permits. After the effective date of said section, the county clerks will not be entitled to receive any additional amount for the service performed under Section 50.810 as amended by the bill. The county court may contract with individuals, corporations or associations for the performance of said services in an amount that the court deems reasonable and just; (2) Section 1 of said bill provides that in counties of second, third and fourth classes which have adopted the provisions of Chapters 114 and 116, RSMo, providing for voter registration, the county clerk shall perform the services specified therein and for such services shall, in addition to the compensation now provided by law, receive the sum of \$1,500 per year. Section 1 is effective October 13, 1969. However, such services are to be performed annually and before May 10th. Accordingly, these services could not be performed for the year 1969, and such county clerks are not entitled to such compensation for the year 1969. Such services can be performed for the year 1970 and such compensation is effective for the year 1970, but not thereafter in view of the effective date of termination of the provisions for increased compensation which is December 31, 1970.</p>
411-69	Sept 30	BONDS.	<p>Bondsman may establish qualification by means of encumbered property having clear value in excess of encumbrance, or by personal property having stable value, but not by property held by entireties.</p>

413-69	Nov 25	SCHOOLS. TEACHERS.	1. Insubordination as used in paragraph 168.107 1(3) means: A teacher's willful, intentional refusal or neglect to obey an express or implied command, instruction, order or rule of the teacher's employing school board, which command, instruction, order or rule is known to the teacher, is reasonable in nature and is given by and with proper authority. 2. A teacher belonging to a voluntary organization whose membership consists in part of teachers would not be in violation of Section 168.116 if the association takes part in the management of a campaign for the election or defeat of a member of a board of education so long as the teacher member does not take part in the initiation or control of the campaign.
414-69	Oct 2		Opinion letter to the Honorable Thomas E. Miles
415-69	Sept 23		Opinion letter to the Honorable Jack J. Schramm
416-69	Sept 25	SCHOOLS.	There is no Missouri statute or regulation of the State Board of Education requiring students to take "mass showers" or requiring teachers to include sex education in the curriculum of kindergarten through sixth grade.
417-69	Nov 25	COUNTIES. TAX LEVY. TAXATION.	The county court of a second class county having anticipated the assessed valuation of the county to be in excess of \$300 million cannot consistent with Article X, Section 11(b), Missouri Constitution, and Section 50.550, RSMo 1959, propose and adopt a budget for the next fiscal year within which budget there is a recommendation for a tax levy in excess of 35 cents per hundred dollars of assessed valuation.
418-69	Dec 24	ESCAPE FROM COUNTY JAILS.	Pursuant to § 557.390, RSMo 1959, an individual, allegedly absent without leave from the military detained by civilian law enforcers is "lawfully imprisoned or detained . . . upon any criminal charge . . . for the violation of any penal statute," and may be convicted for escaping from such detention.
420-69	Oct 28		Opinion letter to Mr. Joseph Jaeger, Jr.
421-69			Withdrawn
423-69	Oct 14		Opinion letter to the Honorable R. Jay Ingraham
424-69	Oct 30	LOTTERIES.	A contest that requires the entrant to go to a store selling the contest sponsor's product or to buy a magazine in order to obtain an entry blank, and in which prizes are awarded based on a drawing from the submitted entry blanks, does constitute a lottery within the meaning of Article III, Section 39, Missouri Constitution, and therefore, is prohibited in Missouri. A contest that requires the entrants to submit a photograph taken by the entrant, and in which prizes are given, but in which the winners are

			selected on clearly defined elements of skill, is not a lottery within the meaning of the above cited constitutional provisions, and therefore, is not prohibited in Missouri.
425-69			Withdrawn
426-69	Oct 9	CRIMINAL LAWS.	A person who knowingly and willfully makes or causes to be made a false report to any peace officer or other official in the state of Missouri whose duty it is to enforce the criminal laws of the state, concerning an alleged crime, has committed a misdemeanor under Section 562.285, RSMo Supp. 1967, and can be prosecuted therefor.
427-69	Nov 6	CONSERVATION COMMISSION. MAGISTRATE COURTS. LICENSES. JURISDICTION. COURTS.	The courts of Missouri do not have jurisdiction to suspend or revoke permits issued by the Conservation Commission and further the Conservation Commission does not have the power to confer such jurisdiction on the courts and any such rule purporting to confer such jurisdiction is invalid.
428-69	Oct 14	FEES. CIRCUIT CLERKS. COMMON PLEAS CLERKS. CLERKS OF COURTS OF CRIMINAL. CORRECTION.	The clerks of the common pleas courts, clerks of courts of criminal correction, and circuit clerks to whom House Bill No. 35 of the 75th General Assembly applies should collect the fees therein provided in all cases which are not terminated before October 13, 1969, the effective date of such bill.
431-69	Oct 6		Opinion letter to Mr. William L. Culver
432-69			Withdrawn
433-69			Withdrawn
434-69	Oct 9	COMMON PLEAS COURTS. COMPENSATION. LEGISLATION. AUDITOR.	The clerk of the Hannibal Court of Common Pleas shall be compensated for the period October 13, 1969, to the end of his present term, December 31, 1970, under the provisions of existing law and of Section 483.455 of House Bill No. 74 of the 75th General Assembly. After such date, he will be compensated as provided in Section 50.335 of House Bill No. 119 of the 75th General Assembly.
436-69	Oct 9	SCHOOLS. INTEREST. BONDS. SCHOOL BONDS.	The highest rate of interest payable on general obligation school bonds issued by common, six-director, urban or metropolitan school districts in this state is eight per cent per annum.
437-69	Oct 6		Opinion letter to the Honorable Reuben R. Rhoades, D.D.S.
438-69	May 19	LIMITED DRIVING	The courts have no authority to grant limited or hardship driving

		PRIVILEGES. MOTOR VEHICLES. DRIVERS' LICENSES.	privileges to any individual whose license has been revoked for a second conviction for driving while intoxicated under §564.440, RSMo Supp. 1967.
439-69	Oct 30	LIQUOR. INTOXICATING LIQUOR. LICENSES.	<p>1. An applicant for a liquor license in this state must be denied a license by the Supervisor where he has been convicted under the laws of the United States or of any state of an offense involving a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment to the Constitution of the United States.</p> <p>2. An applicant for a liquor license in this state must be denied such license by the Supervisor where he has been convicted in another state of an offense not related to any liquor laws but which is a felony under the laws of that state where such conviction disqualifies him from voting under the laws of this state.</p> <p>3. Where the conviction or convictions are not sufficient to disqualify an applicant on the above grounds, the Supervisor of Liquor Control may refuse to grant such applicant a license where the circumstances surrounding such conviction or convictions are such as to show bad moral character.</p>
440-69	Nov 18	COMPENSATION. TEACHERS. SCHOOLS. COLLEGES.	Pursuant to Section 174.140, Senate Bill No. 12 Seventy-Fifth General Assembly, a state college board of regents has the discretionary authority to pay as part of an employee's compensation the premium for hospitalization, health or life insurance.
441-69	Oct 23	TOWNSHIPS. ASSESSORS.	<p>A duly elected township assessor, who subsequently removes his residence from the township, can make the assessments for 1970 unless removed prior to the making of such assessments.</p> <p>If the assessor is removed prior to making the assessments, it is the duty of the township board to fill such vacancy by appointment.</p> <p>Section 65.200, RSMo 1959.</p>
445-69	Oct 7		Opinion letter to the Honorable Earl Schlef
449-69	Oct 15		Opinion letter to Mr. John C. Vaughn
450-69	Oct 23	ASSESSOR. COUNTY ASSESSOR. PUBLIC RECORDS.	Card Index system kept by assessor belongs to county.
451-69	Nov 13	CIRCUIT CLERKS. ST. LOUIS CITY.	The Clerk of the Circuit Court of the City of St. Louis has the discretionary power and authority to invest funds deposited in the registry of the court in the manner provided in Section 483.310, RSMo 1959, without any action by the General Assembly.
452-69	Oct 23	SCHOOLS. INSURANCE.	A school board has the discretionary authority to pay the premiums for hospitalization and health insurance for its employees as part of their

			compensation.
454-69	Nov 4	INTEREST. BONDS. CONSTITUTIONAL LAW. CITIES, TOWNS & VILLAGES.	(1) House Bill No. 2, as passed by the First Extraordinary Session of the 75th General Assembly, is within the scope of the Governor's special proclamation. (2) House Bill No. 2 complies with the provisions of Section 23 of Article III of the Constitution which require that no bill shall contain more than one subject which shall be clearly expressed in its title. (3) The emergency clause contained in Section A of House Bill No. 2 is invalid in that such clause is not "necessary for the immediate preservation of the public peace, health or safety."
457-69	Oct 24	ELECTIONS. SECRETARY OF STATE. REFERENDUM. INITIATIVE. PETITIONS.	(1) The duty of the Secretary of State with respect to referendum petitions is ministerial rather than discretionary; and if petitions are presented that on their face contain signatures verified as provided for in Section 126.040, RSMo 1959, your duty is only to determine whether there are sufficient signatures from the prescribed number of congressional districts. (2) Circulators of initiative and referendum petitions must personally witness the signing of all names that they verified pursuant to Section 126.040, RSMo 1959; however, there may be more than one circulator for each sheet of a petition. The Secretary of State is required to file all petitions that appear, prima facie, to be in order. The validity of petitions which the Secretary files may be contested according to the provisions of Section 126.050. (3) Elections called by referendum are to be held at the general election in November of even numbered years unless the legislature should designate another date.
462-69	Oct 27		Opinion letter to the Honorable A. J. Seier
463-69	Oct 30	CRIMINAL LAW. RECEIVING STOLEN GOODS.	Person charged with receiving stolen property may be prosecuted in any county in which he is shown to have been in possession of the property.
465-69	Oct 27		Opinion letter to Mr. James E. Schaffner
466-69	Dec 16	ARCHITECTS.	1. Section 327.030 and Section 327.271, RSMo 1959, which authorized the predecessor of the Missouri State Board for Architects, Professional Engineers and Land Surveyors to issue special permits to architects and to collect fees when such permits were renewed, were repealed when Senate Bill 117 of the 75th General Assembly became law on October 13, 1969, and 2. Senate Bill 117 does not authorize the Missouri Board for Architects, Professional Engineers and Land Surveyors to renew, or collect renewal fees for the renewal, of special permits issued before Sections 327.030 and 327.271 were repealed.
467-69	Nov 4	TAXATION (INHERITANCE TAX).	When a testator leaves realty to a husband and wife subject to a life interest in two individuals and the will provides that the grantees of

			the life interest must pay rent in a specified sum to the remainder interest, under Section 145.200, RSMo 1959, the value of the life interest is reduced by the rent payments and the value of the remainder is increased by the same amount.
469-69	Dec 19		Opinion letter to the Honorable Robert H. Branom and the Honorable Kenneth J. Rothman
472-69	Nov 4	POOL TABLES. LICENSES.	An operator of an amusement center is subject to the license fee provided in Chapter 318, RSMo 1959, with respect to a coin operated pool table used in the establishment, even though he is not the owner of the table.
478-69	Dec 11	COUNTIES. COUNTY PLANNING & ZONING.	1. Section 64.900, RSMo 1967 Supp., does not authorize the voters of Jefferson County to terminate county planning and zoning adopted pursuant to the authority of Sections 64.510 through 64.690, RSMo 1959, as amended. 2. There is no constitutional or statutory authority for conducting a referendum on whether Jefferson County shall continue with planning and zoning unless the voters of Jefferson County, pursuant to Section 64.905, RSMo 1967 Supp., adopt county planning or zoning under the provisions of Sections 64.800 to 64.905, RSMo 1967 Supp., thereby bringing the county within the coverage of Section 64.900, RSMo 1967 Supp.
480-69	Dec 19		Opinion letter to the Honorable A. Basey Vanlandingham
485-69	Nov 3		Opinion letter to the Honorable James L. Paul
487A-69	Dec 31	CONSTITUTIONAL LAW.	(1) Senate Bill No. 241 of the 75th General Assembly is not unconstitutional in violation of Article I, Section 13, Missouri Constitution; and (2) Senate Bill No. 241 is not unconstitutional in violation of Article X, Section 10(a), Missouri Constitution.
488-69	Nov 25	MOTOR VEHICLES. LICENSES.	The Department of Revenue has the right, and duty to collect the fees for motor vehicle registration as provided in Senate Bill No. 242, 75th General Assembly. The Department of Revenue must collect these fees regardless of whether one or two license plates are provided pursuant to Senate Bill No. 242. While the Department of Revenue must collect the increased fees provided for in Senate Bill No. 242, the Department of Revenue need not provide two license plates until January 1, 1971.
498-69	Oct 31		Opinion letter to the Honorable Kenneth Rothman
499-69	Dec 9		Opinion letter to Mrs. Olean Barton
500-69	Nov 18	SCHOOLS. INSURANCE.	A school board has the discretionary authority to pay the premiums for life insurance for its employees as part of their compensation.
502-69	Nov 14		Opinion letter to the Honorable Frank Bild

503-69	Nov 20		Opinion letter to the Honorable James C. Kirkpatrick
504-69	Nov 5		Opinion letter to the Honorable Haskell Holman
506-69	Dec 18	USURY. REAL ESTATE MORTGAGES. FHA GUARANTEED LOANS.	(1) Consideration paid by buyer to lender for bona fide services is not interest. (2) Consideration by seller to lender to induce making of loan is not interest unless shown to be subterfuge to establish artificially high purchase price. (3) Mortgage insurance premiums collected by lender and paid to FHA do not constitute interest. (4) Section 362.195, RSMo 1959, purporting to exempt FHA guaranteed loans from usury laws is unconstitutional.
508-69	Nov 14		Opinion letter to the Honorable Edna Eads
510-69			Withdrawn
511-69	Dec 2	AGRICULTURE. ADMINISTRATIVE HEARING COMMISSIONER.	Hearings to organize Commodity Merchandising Councils authorized by Senate Bill No. 65, 75th General Assembly, shall be conducted by the person holding the office of Administrative Hearing Commissioner who has been appointed by the Governor with the advice and consent of the Senate pursuant to Section 161.252, RSMo Supp. 1967, and that the Commissioner of Agriculture is empowered to make the determination from the record taken of the testimony received at the hearing.
512-69	Dec 19		Opinion letter to Mr. Gene Sally
514-69	Nov 25	CITIES, TOWNS AND VILLAGES. CITY OFFICERS.	There is no statutory requirement that appointed police officers in third class cities governed by provisions of Chapter 77, RSMo 1959, be residents of such city, but such cities may by ordinance require residence or other qualifications in addition to those prescribed by statute. An existing ordinance requiring such residence is not rendered invalid or ineffective by a statutory amendment permitting the employment of nonresident police officers.
516-69	Dec 23	CITIES, TOWNS AND VILLAGES. CITIES OF FOURTH CLASS. POLICE. RESIDENCE.	A person may be appointed as a policeman in a fourth class city who is not a resident of such city.
520-69			Withdrawn
524-69	Dec 19		Opinion letter to Dr. Walter C. Daniels
525-69	Dec 16		Opinion letter to the Honorable N. William Phillips
528-69			Withdrawn

536-69	Dec 19	REAL ESTATE COMMISSION.	The Secretary of the Missouri Real Estate Commission is prohibited from engaging in the real estate practice.
537-69	Dec 2	MENTAL ILLNESS. PROBATE COURT. DIVISION OF MENTAL HEALTH.	Under Sections 202.805 and 202.807 of House Bill 43 of the 75th General Assembly, (1) An indigent patient is entitled to an attorney and the attorney is entitled to a reasonable fee for his services which fee is assessed as a cost to be paid by the county of residence regardless of whether or not the proceedings are held in the county of residence or in the county wherein the facility is located. (2) Commitment proceedings instituted under Section 202.807 pursuant to and as prescribed by Section 202.805 are to be held in the county wherein the facility is located unless the patient applies to have said proceedings transferred to the jurisdiction of the probate court of his county of residence as defined in Section 202.010.
538-69	Dec 23	CRIMINAL LAW. FIREARMS. CONCEALED WEAPONS. WEAPONS.	Section 564.630, RSMo Supp. 1967, requires that a retail dealer in firearms purchasing a concealable firearm from another such retail dealer or from a person who is neither a wholesaler nor a manufacturer must obtain and deliver to the seller a permit authorizing such retail dealer to purchase the concealable firearm.
548-69	Dec 31	CIRCUIT CLERKS.	The circuit clerk of a second class county must keep safe and have readily available for payment \$25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit, so long as the money is readily available for payment. This can be done on the clerk's own initiative or upon consent of both parties by written agreement. The clerk can also invest in other interest-bearing accounts when done pursuant to court order. The clerk can only pay the funds and the interest earned from investment of the funds as directed by the court. The clerk must also adhere to the requirements of Section 483.312, RSMo 1959.
552-69	Dec 23	COUNTY CLERKS. DEPUTIES. DEPUTY COUNTY CLERKS.	Because of the absence of constitutional or statutory provisions requiring that a deputy county clerk be a resident of the county in which he or she serves, it is permissible for such person to reside in another county in this state.
583-69	Dec 22		Opinion letter to the Honorable William Y. McCaskill
588-69	Dec 31	ELECTIONS. SECRETARY OF STATE. REFERENDUM. INITIATIVE. PETITIONS.	(1) The signers of a given sheet of a referendum petition are not required to reside in the same congressional district and a signature on a referendum petition would not be invalid because the petition purports to come from a congressional district in which the signer does not reside; (2) a petition that omits the county in which a signer resides or incorrectly states the county in which a signer resides is not invalid and signatures should not be disqualified on that account; (3) the

			Attorney General or a prosecuting attorney has no authority to act to prevent the filing of petitions that appear to contain forged signatures; the Secretary of State's function in filing petitions is ministerial and he has no authority to reject signatures that appear forged; (4) those same officials have no authority to ascertain whether or not a copy of the bill to be referred was attached to a referendum petition, and therefore may not act to prevent the filing of a petition on the ground that a copy of the bill allegedly was not attached at the time the petition was circulated; (5) a notary may witness the sworn statement of a circulator when the notary has also signed the sheet of the petition which he notarizes; (6) a notary may notarize petitions in any part of the state in which he has authority to act as a notary, there being no requirement that referendum petitions be notarized in the county in which they are circulated.
592-69	Dec 31		Opinion letter to Mr. Hubert Wheeler

Answer by letter-Nowotny

April 15, 1969

OPINION LETTER NO. 3

Honorable Clinton Almond
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri 63050



Dear Mr. Almond:

This is in answer to your request for an opinion of this office on the following three questions:

"(1) May members of the Jefferson County Park and Recreation Commission be paid fees for attendance of Regular and Special Meetings.

"(2) If attendance fees cannot be paid, may members of the Park and Recreation Commission be paid mileage expenses for attendance of Regular and Special Meetings.

"(3) May members of the Park and Recreation Commission receive mileage expense payment in connection with research for possible park sites."

Sections 64.750 through 64.780, RSMo Supp. 1967, enacted in 1961, provide for and deal with a system of public recreation for political subdivisions. We note that Jefferson County comes under these provisions.

Authority for the Jefferson County Park and Recreation Commission is specifically given by Section 64.765, RSMo Supp. 1967. This section states in part that: "* * * Members of the board shall serve without pay. * * *"

Nowhere in Sections 64.750 through 64.780 does the legislature provide for fees for attendance at meetings or for mileage expenses for any purpose.

Honorable Clinton Almond

Enclosed is a copy of Attorney General Opinion No. 4, dated April 1, 1969, issued to the Honorable Charles A. Weber, which answers your questions. Accordingly the members of the Commission are not entitled to be paid fees or reimbursement for mileage expenses for attendance at regular and special meetings but may receive reimbursement for actual and necessary travel expenses for trips incurred in the performance of their duties as commissioners.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 4
4-1-69, Weber

MOTOR VEHICLES:

TRUCKS:

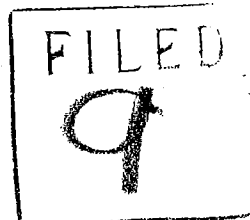
WEIGHT REGULATIONS:

1. If the weight on a tandem axle does not exceed thirty-two thousand (32,000) pounds but the weight on one of the axles in the tandem group

exceeds eighteen thousand (18,000) pounds there is a violation of Section 304.180, RSMo Cum. Supp. 1967. 2. Any one axle, however, positioned or attached, may not exceed the weight of eighteen thousand (18,000) pounds prescribed for a single axle. 3. A weight limitation of eighteen thousand (18,000) pounds on a single axle of a tandem group is not in conflict with or in excess of that permitted under the provisions of Section 127 of Title 23 of the United States Code (public law 85-767, 85th Congress). 4. A holding that, under Section 304.180, the weight of any one axle of a tandem group can lawfully exceed eighteen thousand (18,000) pounds would render the State of Missouri ineligible for apportionment of future interstate funds under Section 108(b) of the Federal Aid Highway Act of 1956.

OPINION NO. 9

March 18, 1969



Colonel E. I. Hockaday
Superintendent
Missouri State Highway Patrol
Waggoner Building
Jefferson City, Missouri 65101

Dear Colonel Hockaday:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"An opinion is requested from your office as to whether under Section 304.180, one axle of a tandem axle may exceed the single axle weight of 18,000 pounds."

The pertinent provisions of Section 304.180, RSMo Cum. Supp. 1967, in relation to the opinion request are as follows:

"1. No vehicle or combination of vehicles shall be moved or operated on any highway in this state having a greater weight than eighteen thousand pounds on one axle and no vehicle shall be moved or operated on the highways of this state having a greater weight than thirty-two thousand pounds on any tandem axle; the term 'tandem axle' shall mean a group of two or more axles, arranged one behind another, the distance between the extremes of which is more than forty inches and not more

Colonel E. I. Hockaday

than ninety inches apart and further provided, however, that when any vehicle or combination of vehicles with six axles which include a tandem axle group as above defined and a group of three axles which are fully equalized, automatically or mechanically, and the distance between the center of the extremes of which do not exceed one hundred ten inches, the chief engineer of the Missouri state highway department shall issue a special permit for the movement thereof, as provided in section 304.200, for eighteen thousand pounds for each axle of the tandem axle group and for sixteen thousand pounds for each axle of the group of three fully equalized axles which are equalized, automatically or mechanically, when said vehicle or combination of vehicles is used to transport excavation or construction machinery or equipment, road-building machinery or farm implements over routes in the primary system and other routes that are not a part of the interstate system of highways; provided, further, that the chief engineer of the Missouri state highway department may issue such permits on the interstate system.

"2. An 'axle load' is defined as the total load transmitted to the road by all wheels whose centers are included between two parallel transverse vertical planes forty inches apart, extending across the full width of the vehicle.

* * * *

"4. Nothing in this section shall be construed as permitting lawful axle loads, tandem axle loads or gross loads in excess of those permitted under the provisions of section 127 of title 23 of the United States Code (public law 85-767, 85th Congress)." As amended Laws 1965, p. 489, Sec. 1; Laws 1967, p. _____, S.B.No. 90, Sec. 1.

In addition to the above Missouri legislation, Section 127 of Title 23 of the United States Code (public law 85-767, 85th Congress) reads as follows:

"No funds authorized to be appropriated for any fiscal year under section 108(b) of the Federal-Aid Highway Act of 1956 shall be apportioned to any State within the boundaries of which the

Colonel E. I. Hockaday

Interstate System may lawfully be used by vehicles with weight in excess of eighteen thousand pounds carried on any one axle, or with a tandem-axle weight in excess of thirty-two thousand pounds, or with an over-all gross weight in excess of seventy-three thousand two hundred or eighty pounds, or with a width in excess of ninety-six inches, or the corresponding maximum weights or maximum widths permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, whichever is the greater. Any amount which is withheld from apportionment to any State pursuant to the foregoing provisions shall lapse. This section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof that could be lawfully operated within such State on July 1, 1956. With respect to the State of Hawaii, laws or regulations in effect on February 1, 1960, shall be applicable for the purposes of this section in lieu of those in effect on July 1, 1956. Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 902; Pub.L. 86-624, § 17(e), July 12, 1960, 74 Stat. 416."

To briefly summarize the above legislation, Section 204.180, supra, provides that a motor vehicle shall not be operated on any highway of this state with a weight on one axle in excess of eighteen thousand (18,000) pounds. It further provides that no motor vehicle shall be operated on any highway of this state having a greater weight than thirty-two thousand (32,000) pounds on a tandem axle. A tandem axle is defined as one where the distance between the axles is forty (40) to ninety (90) inches. Lastly nothing shall be construed as permitting lawful (axle loads on) tandem axle loads in excess of those permitted under the provisions of Section 127 of Title 23 of the United States Code. In this connection, the federal legislation provides that no funds authorized to be appropriated for any fiscal year under section 108(b) of the Federal Aid Highway Act of 1956 shall be apportioned to any state allowing motor vehicles to operate on the federal interstate system of highways with weight in excess of eighteen thousand (18,000) pounds carried on any one axle, or with a tandem axle weight in excess of thirty-two thousand (32,000) pounds.

It is submitted that there are two issues for determination:
(1) Whether there is a violation of Section 304.180, supra, if one of the axles in a tandem group exceeds eighteen thousand (18,000) pounds, but the total weight on the tandem axle does not exceed

Colonel E. I. Hockaday

thirty-two thousand (32,000) pounds; and (2) Whether the interpretation of Section 304.180, supra, is in conflict with or in excess of the weight provisions provided for in Section 127 of Title 23 of the United States Code. We will first direct our attention to the former issue.

In the consideration of this problem, an argument has been made in support of the contention that there is no violation of Section 304.180, supra, if one of the axles in a tandem group exceeds eighteen thousand (18,000) pounds. Briefly, the argument is as follows: "the legislature intended to set up an axle weight limit, a tandem axle weight limit and a gross weight limit. The gross weight limit was set expressly subject to the limit on any one axle or any tandem axle. The law does not say that the weight on any tandem axle is subject to the weight on one axle in the tandem combination or group; had the legislature meant to make the tandem axle subject to the weight limit on a single axle it would have said so." As further support for such an argument, it has been stated that criminal statutes are to be construed strictly, liberally in favor of the defendant, and strictly against the state. Consequently, since Section 304.180, supra, is penal in nature, a strict interpretation should be favored so that a tandem axle is not subject to the eighteen thousand (18,000) pound single axle limitation. Although the above contention is a valid argument, we are not persuaded that this is the proper interpretation of Section 304.180, supra.

It is a cardinal rule, universally accepted that in the exposition of a statute, the intention of the lawmaker will prevail over the literal sense of the terms; its reason and intention will prevail over the strict letter. See *State v. Schwartzmann Service, Inc.*, 40 S.W.2d 479. While it is also true that a criminal statute is to be strictly construed since it is penal in nature, it is not to be given its narrowest meaning, if such is directly contrary to the intention of the legislature, or out of harmony with its manifest purpose and intent. *State v. Chadeayne*, 313 S.W.2d 757. In this connection, the argument made that the intent of the legislature was to allow thirty-two thousand (32,000) pounds on either axle of the tandem group is not persuasive. It is inconceivable that the legislature intended such a result where the statute specifically states that no vehicle shall be operated on any highway in this state having a greater weight than eighteen thousand (18,000) pounds on one axle. In addition the legislative history of the statute reveals that since 1925 the General Assembly has never approved more than eighteen thousand (18,000) pounds on a single axle. (RSMo 1939 Sec. 8406, A.L. 1943, p. 663, A. 1949 S.B. 1113, A.L. 1951, p. 695, A.L. 1957, p. 624, A.L. 1963, p. 417, A.L. 1965, p. 489, A.L. 1967, S.B. 90). Instead, it is our belief that the purpose of the statute was to prevent injury to public property in the form of damage to roads, bridges, etc., and to insure the safety of persons traveling over the highways by prohibiting the use of public highways by motor vehicles of excessive weight. See *Commonwealth v. Burall*,

Colonel E. I. Hockaday

22 A.2d 619, 146 Pa. Super. 525. A similar viewpoint is expressed in the Missouri case of State v. Schwartzmann Service, Inc., supra, where the court in referring to Section 304.180, stated on page 480: "The purpose of the statute, manifestly, is to protect the highways of the state from the damage that may be done by vehicles of excessive weight. * * *". Therefore, it is our opinion that in keeping with the intent of the General Assembly, the proper construction of Section 304.180 requires a limitation of eighteen thousand (18,000) pounds on a single axle of a tandem axle group in order to spread the weight over as large a surface of the highway as practicable. It should be noted that any argument made that this result is achieved with "equalizers" which in our understanding are devices attached to tandem axles to equalize weights in connection with both axles, is without merit as not all motor vehicles are equipped with such devices and there is no legislation requiring the use of "equalizers." Finally, it is submitted that this holding is not unreasonable in view of Section 304.230, RSMo Cum. Supp. 1967, which provides that when only an axle or a tandem axle of a vehicle is overloaded on roads other than the federal interstate system of highways, the operator is permitted to shift the load provided this does not overload some other axles or axle without being charged with a violation. (For similar interpretation, see Op. Atty. Gen. No. 213, Lance, 4-27-66). Also Section 364.230 provides that when only an axle or tandem axle group of a vehicle traveling on the federal interstate system of highways is overloaded, a court may find that no violation has been committed, if the overloading was due to the inadvertent shifting of the load, changing axle weights in transit through no fault of the operator of the vehicle.

Having decided that under Missouri law, a single axle of a tandem axle group is subject to the eighteen thousand (18,000) pounds limitation required for single axles, we now consider whether such decision is in conflict with Section 127 of Title 23 of the United States Code. In this connection, we have requested the assistance of the United States Department of Transportation. We were consequently advised that while there was no federal requirement that the weight of individual axles within a tandem axle group be measured singly, the requirement of 23 U.S.C. 127 were taken from policy recommendations by the American Association of State Highway Officials which made the following proposal as to the maximum permissible weight for a tandem axle:

"2.08.02 Tandem-axle weight: The total gross weight imposed on the highway by two or more consecutive axles in tandem articulated from a common attachment to the vehicle, and spaced not less than 40 inches nor more than 96 inches apart, shall not exceed 32,000 pounds, and no one axle of any such group of two consecutive axles shall exceed the weight permitted for a single axle. Further, the weight imposed on the highway by two or more consecutive axles, individually attached to the vehicle and

Colonel E. I. Hockaday

spaced not less than 40 inches or more than 96 inches apart, shall not exceed 32,000 pounds. No one axle of any such group of two or more consecutive axles shall exceed the weight permitted for a single axle." (emphasis added)

Therefore, it was the advice of the United States Department of Transportation that in order for two axles of a vehicle to meet the requirements of being a tandem axle, the axles must be so attached or articulated as to equalize substantially the load between them and that a ruling by this office, holding that there was no violation of Section 304.180 if one of the axles in a tandem group exceeded eighteen thousand (18,000) pounds but the total weight on the tandem axle did not exceed thirty-two thousand (32,000) pounds would be inconsistent with the AASHO policy and with 23 U.S.C. 127. (Copy of letter of May 28, 1968 attached).

Subsequent to receiving the above letter from the United States Department of Transportation, this office requested clarification in regard to the following: whether that portion of the AASHO policy as quoted therein: "* * * no one axle of any such group of two consecutive axles shall exceed the weight permitted for a single axle.", meant that no one axle of any two consecutive axles as distinguished from a tandem axle group should exceed the weight permitted for a single axle or whether the underlined phrase applied only to a weight limitation on a tandem axle group. We were then informed by the United States Department of Transportation in part as indicated below:

"* * * The words 'such group' clearly relate back to phrase 'two or more consecutive axles in tandem articulated from a common attachment,' meaning that neither of two axles considered together as a tandem group may exceed 18,000 pounds. The wording of the next sentence, separately relating to axles 'individually attached', further confirms this view. Thus, in no event may any one axle, however positioned or attached, exceed the weight prescribed for a single axle by 23 U.S.C. 127." (emphasis added)

In addition, this office requested further clarification by specifically requesting the opinion of the United States Department of Transportation as to whether the State of Missouri would be ineligible to receive an appropriation of federal funds under the Federal Highway Act of 1956 if a ruling was made by this office that there was no violation of Section 304.180, RSMo Cum. Supp. 1967, if one of the axles in a tandem group exceeded eighteen thousand (18,000) pounds. but the total weight of the tandem axle did not exceed thirty-two thousand (32,000) pounds. We were informed by the United States Department of transportation that a ruling by this

Colonel E. I. Hockaday

office permitting one axle of a tandem group to exceed eighteen thousand (18,000) pounds would render Missouri ineligible for apportionment of future interstate funds under Section 108(b) of the Federal Aid Highway Act of 1956. (Copy of letter of July 15, 1968 attached).

CONCLUSION

In conjunction with the advice of the United States Department of Transportation, the opinion of this office is as follows:

1. If the weight on a tandem axle does not exceed thirty-two thousand (32,000) pounds but the weight on one of the axles in the tandem group exceeds eighteen thousand (18,000) pounds there is a violation of Section 304.180, RSMo Cum. Supp. 1967.

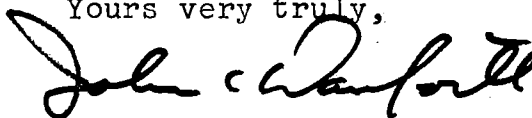
2. Any one axle, however, positioned or attached, may not exceed the weight of eighteen thousand (18,000) pounds prescribed for a single axle.

3. A weight limitation of eighteen thousand (18,000) pounds on a single axle of a tandem group is not in conflict with or in excess of that permitted under the provisions of Section 127 of Title 23 of the United States Code (public law, 85-767, 85th Congress).

4. A holding that, under Section 304.180, the weight of any one axle of a tandem group can lawfully exceed eighteen thousand (18,000) pounds would render the State of Missouri ineligible for apportionment of future interstate funds under Section 108(b) of the Federal Aid Highway Act of 1956.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 213
4-27-66, Lance

Let. to Jones
5-28-68

Let. To Jones
7-15-68

CONSTITUTIONAL LAW:
CONTRACTS:
CREDIT LIFE INSURANCE:
EMBALMERS:
FUNERAL DIRECTORS:
FUNERAL PLANS:
INSURANCE:
STATUTES:

Sections 436.010 through 436.080, RSMo Supp. 1967, neither prohibit nor authorize the sale of credit life insurance in connection with installment purchases of prearranged funeral plans. Sales of such insurance policies are permitted, provided that all statutory requirements relating to the sale of such insurance are met. Sections 436.010 through 436.080 govern the handling and investing

of money collected only under prearranged funeral plans entered into after the effective date of those sections, October 13, 1965.

OPINION NO. 10

August 19, 1969

Honorable Harold L. Holliday
Representative
14th District
1220 East 31st Street
Kansas City, Missouri

64109



Dear Representative Holliday:

This is in response to your request for an opinion of this office concerning an interpretation of Chapter 436, RSMo Supp. 1967. In your original request you stated the questions as follows:

"1. Under the provisions of that chapter, may a seller of prearranged funeral agreements also sell the purchaser a credit life policy issued by a bona fide life insurance company and charge the purchaser an extra premium therefor? The credit life policy is for the purpose of paying the balance due under the agreement in the event the purchaser dies before the full amount has been paid."

"2. Does the enactment of Chapter 436 affect prearranged funeral agreements that were in effect prior to October, 1965, where the plan was fully paid for prior to October, 1965, or where the plan was in effect prior to 1965, but payments are being made subsequent to October, 1965?"

Upon being asked to clarify the questions, you replied in part as follows:

"The first question relates to whether or not it would be permitted, not compelled, for purchasers of a preneed funeral plan to purchase credit life insurance issued by a bona fide life insurance company with the premium being paid by the purchaser to the funeral home."

"The second question relates to the manner of handling funds collected under the provisions of pre-October 1965 contracts. I desire to know if the arrangements in effect on contracts issued prior to 1965 must be

Honorable Harold L. Holliday

converted or changed to the arrangements required under the present Chapter 435 RSMo; i.e., if the funds collected on the pre-October 1965 contracts were deposited in the trust fund maintained in an institution or corporation other than those specified in the present Chapter 436 may continue to hold such funds in accordance with the contract and trust indenture executed prior to 1965. We desire to know if all funds collected on pre-October 1965 contracts must be handled in accordance with the provisions in the present Chapter 436. This question relates to contracts fully paid for in 1965, as well as to contracts which were in effect prior to 1965 but on which payments have been made subsequent to October 1965."

With respect to whether a policy of credit life insurance may be sold simultaneously with a prearranged funeral agreement, we find nothing in Chapter 436 which prohibits such a sale. By the same token, however, nothing in Chapter 436 operates to exclude credit life insurance policies sold in connection with such agreements from other requirements relating to the sale of credit life policies. Consequently, all such sales of credit life insurance would come under and be governed by the statutory provisions relating to sales of policies of such insurance. That is to say, a person who acts as an insurance agent is no less an insurance agent because the sale of insurance forms a part of the negotiation for the sale of the agreement, it is possible that Chapter 436 would control the handling of the money collected therefor, and we repeat that no opinion is expressed on such issue. But, in no event can Section 436.010 or any other provision in that chapter be read as a pro tanto repeal of the laws pertaining to the licensing of insurance salesmen and brokers.

Your second question presents the issue of whether the enactment of Chapter 436 by the Seventy-Third General Assembly governs prearranged funeral plans entered into prior to the effective date of that legislation (October 13, 1965). Prior to that time Missouri had no statutes which specifically regulated prearranged funeral plans. From the content of the sections comprising that chapter, it is obvious that they were intended as remedial measures, having as their purpose the correction or prevention of abuses arising from the retention of unearned funds for long periods of time by the sellers of such plans.

The sections in question contemplate that the plans shall be effectuated by "a written agreement not in conflict herewith." Section 436.010. The money collected by the seller may be deposited only in certain types of institutions, Section 436.020, or placed in trust and invested under certain restrictions. Section 436.040. Provision is made for the purchaser to cancel his participation in the plan and retrieve the amount paid in, less that which may be retained by the seller according to statutory formula. Section 436.060.

Hence, prior to October 13, 1965, a purchaser of a funeral plan was protected as to the handling of the money he invested in it only by the terms of his contract with the seller. Thereafter, any such agreement is "declared against public policy and void, unless all money paid thereunder is handled . . ." as provided in Chapter 436. Criminal sanctions and injunctive measures are also provided for where the chapter is violated. Section 436.070, 436.080.

We are well aware of the rule that ". . . one of the cardinal principles of construing remedial legislation is that courts are to consider the evil sought to be cured and 'to make such construction as shall suppress the mischief, and advance

Honorable Harold L. Holliday

the remedy and to suppress subtle inventions and evasions for the continuance of the mischief'." B-W Acceptance Corporation v. Benack, (Mo. App., 1967) 432 SW 2d 215, 218.

Unfortunately, we have before us a question which encompasses all pre-October 1965 prearrangement funeral contracts without having those contracts before us. However, your clarifying statement concerning the contracts to which you refer describes them as ones under which "the funds collected. . . were deposited in the trust fund maintained in an institution or corporation other than those specified in the present Chapter 436 . . ." and asks whether the funds may continue to be held in such manner, "in accordance with the contract and trust indenture executed prior to 1965." Limiting this opinion to the contracts you describe, we believe that an affirmative answer is required for the reasons hereinafter stated.

A well established rule of statutory construction is that legislative enactment are held to operate prospectively unless the contrary intent is shown clearly and unequivocally. In the case of Atchison v. Retirement Board, 343 SW 2d 25, the Supreme Court of Missouri quoted approvingly from the case of State ex rel Heaven v. Ziegenhein, 144 Mo. 283, 45 SW 1099, as follows, l.c. 32:

"* * *The rule is that legislative enactments are held 'to operate prospectively, and not otherwise, unless the intent that they are to operate in such an unusual way, to wit, retrospectively, is manifest upon the face of the statute in a manner altogether free from ambiguity.' * * *"

Section 436.010 reads in part as follows:

"Any agreement, contract or plan requiring the payment of money by a purchaser in a lump sum or in installments, which is made or entered into with any person . . . who, in consideration thereof, agrees to provide for the final disposition of a dead human body, . . . wherein . . . the funeral . . . is not immediately required, is hereby declared against public policy and void, unless all money paid thereunder is handled in accordance with the provisions of Sections 436.010 to 436.080, and subject to the terms of a written agreement not in conflict herewith . . . A seller shall not be entitled to enforce any contract made in violation of Section 436.010 to 436.080, but the purchaser or his heirs, or legal representatives, shall be entitled to recover all amounts paid to the seller under any contract made in violation hereof, and all amounts paid, whether or not paid to the seller, to any fund or for any investment, debenture, security, or contract in connection with the seller has violated the provisions of Sections 436.010 to 436.080, together with a reasonable attorney's fee therefor."

Notwithstanding the obviously salutary purposes of that section and those which follow it, it is our opinion that the Legislature meant for Chapter 436 to operate only prospectively; that is, to control only those prearranged funeral plans entered into after the effective date of the chapter regardless of whether

Honorable Harold L. Holliday

such plans were fully paid at the time they were entered into or are still being paid by installments.

In State ex rel. Clay Equipment Corporation v. Jensen, (Mo. Supp. 1963), 363 SW 2d 666, the Supreme Court of Missouri was required to interpret a newly enacted statute which declared that any foreign corporation not licensed to do business in this state would be held to be doing business if it committed a tort in Missouri. The statute also authorized service of process upon the Secretary of State as agent for the foreign corporation. The specific issue presented was whether the statute applied to a suit instituted after its effective date but arising out of a tort which pre-dated the statute. There the Court said, l.c. 669-670:

"We think that subsection 2, of Section 351.630 RSMo 1959, as amended Laws 1961, p. 257, VAMS, evidences a clear intention on the part of the Legislature that the statute shall operate prospectively only. It expressly says: 'If a foreign corporation commits a tort.' This statement points to a happening in the future. The statute does not say, 'If a foreign corporation has committed a tort at sometime in the past, or before, this statute goes into effect'."

* * * *

"Further, as a general rule, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts, or by necessary or unavoidable implication. . ."

We do not believe that the language of Section 436.010 contains any such "necessary or unavoidable implication. On the contrary, it appears to evidence a contrary intent. Note that Section 436.010 declares the prearrangement plans null and void unless all money paid thereunder "is handled in accordance with Section 436.010 to 436.080." Likewise, that and subsequent sections condemn contracts "made in violation of Sections 436.010 to 436.080."

In view of the fact that these sections did not exist prior to October 13, 1965, and in view of the fact that, as in the Jensen case, supra, the statute speaks in terms of the future (i.e., "Any agreement. . . which is made or entered into . . .," not, "Any agreement. . . which has been made . . ."), it is our opinion that Chapter 436 was intended to control and govern only those pre-arranged funeral plans which were entered into after the effective date of the chapter.

CONCLUSION

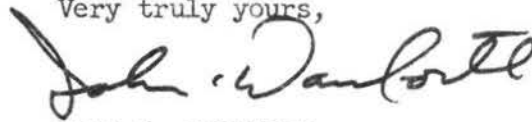
It is the opinion of this office that Sections 436.010 through 436.080, RSMo Supp. 1967, neither prohibit nor authorize the sale of credit life insurance in connection with installment purchases of prearranged funeral plans; and that, therefore, sale of such insurance policies are permitted, provided that all sta-

Honorable Harold L. Holliday

tutory requirements relating to the sale of such insurance are met. It is further the opinion of this office that Sections 436.010 through 436.080 govern the handling and investing of money collected only under prearranged funeral plans entered into after the effective date of those sections, October 13, 1965.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Albert J. Stephan, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General



May 26, 1969

OPINION LETTER NO. 12

Honorable James A. Noland, Jr.
State Senator - 33rd District
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Noland:

This letter is in response to your opinion request concerning the question whether a legislator who is a member of the Public School Retirement System of Missouri can become a member of the Missouri State Employees Retirement System. We are enclosing an official Opinion Letter, No. 39, under date of May 15, 1961, to Mr. W.R. Henry, Mr. Ealum Bruffett and Mr. F.L. Brenton, which opinion we believe answers your first question.

Your request also raises the question as to whether a legislator who has been a member of the Missouri State Employees Retirement System can become a member of the Public School Retirement System of Missouri. The assumption is made that you are referring to a former legislator who returns to teaching, but is eligible to receive or is receiving a retirement annuity from the State Retirement System.

Chapter 169, RSMo 1959, relating to the Public School Retirement System of Missouri, does not expressly prohibit a person from belonging to the State Teachers Retirement System if he is eligible to receive or is receiving a retirement annuity from the State Employees Retirement System. However, it should be noted that under the definition of teacher in subsection 6 of Section 169.010, RSMo 1959, a member of the Teachers Retirement System is required to be employed on a full-time basis.

Honorable James A. Noland, Mr.

In conclusion, as to your second question, it is our belief that a former legislator who is eligible to receive or is receiving a retirement annuity from the State Retirement System may become a member of the State Teachers Retirement System if he returns to teaching on a full-time basis.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 39
5/15/61, Henry

POLICE DEPARTMENTS:
POLICE OFFICERS
CITIES, TOWNS, AND
VILLAGES--
CITY POLICE

Graduation from or completion of courses offered by the Police Academy of Metropolitan St. Louis Police Department does not fulfill the requirements of Section 66.250, RSMo Supp. 1967.

OPINION NO. 13-1969
52-1968

January 10, 1969

Honorable Barbara Kurtz
Assistant Prosecuting Attorney
St. Louis County Prosecuting Attorney Office
Clayton, Missouri 63105



Dear Mrs. Kurtz:

In response to your request for an opinion from this office on the question whether the law enforcement officers training course conducted by the Police Academy of the Metropolitan St. Louis Police Department fulfills the requirement of paragraph one of Section 66.250 RSMo, Supp 1967, which provides:

"1. Any person hired after October 13, 1963, to serve as a police officer in a municipal police department in any county of the first class having a chartered form of government shall, within six months after beginning such employment, satisfactorily complete a law enforcement officer training course conducted by the county police department of the state highway patrol or any accredited college course for police officers."

The Supreme Court of Missouri in the case of *in re Burgess*, 359 SW 2nd 484, stated the general rule as to statutory construction. The court said, l.c. 487:

"The basic rule of statutory construction is to seek intention of law makers and, if possible, to effectuate that intention, and the court should ascertain legislative intent from the words used, if possible, and should ascribe to language used in its plain and rational meaning."


In determining the intent and application of this statute it is obvious that law makers specifically designated a law enforcement officers training course conducted by the county police department or state highway patrol or an accredited college course for police officers. There is no mention of the officers training course conducted by the Metropolitan St. Louis Police Department. We are informed by officials of the St. Louis City Police Department that the law enforcement officers training course conducted by the Police Academy of the Metropolitan St. Louis Police Department is not accredited by any college or university. Since the training course conducted by the Metropolitan St. Louis Police is not accredited by any college or university, completion of such course is not a compliance with the requirements of Section 66.250.

CONCLUSION

It is the opinion of this office that a person hired after October 13, 1963, to serve as a police officer in a municipal police department in a first class county with a chartered government who does not within six months after beginning such employment satisfactorily complete a law enforcement officers training course conducted by the county police department or the state highway patrol or an accredited college course for police officers does not fulfill the requirements of Section 66.250 RSMo supp 1967 and the completion of a law enforcement officers training course conducted by the Police Academy of Metropolitan St. Louis Police Department does not fulfill the requirements of such Section.

The foregoing opinion which I have approved was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

MS

FILED
15

February 3, 1969

OPINION NO. 15
Answered by Letter
Culver

Honorable Don Witt
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Witt:

This is in answer to your request for an opinion of this office on two questions concerning the county assessor of a third class county. The first question is as follows:

"On page 3-7 the audit discusses the accounts of Francis M. Bell, Assessor. This in turn refers to pages 46, 46-1, and 46-2. In substance, it would appear that in some years Mr. Bell overcharged the state and county for the number of lists compiled by him and in other years he undercharged the state and county. From September 1, 1957 to August 31, 1958 the amount of the undercharge was \$154.81. From September 1, 1958 to August 31, 1959 the amount of the overcharge was \$130.37. From September 1, 1959 to August 31, 1960 the amount of the overcharge was \$325.78. From September 1, 1960 to August 31, 1961 the amount of the overcharge was \$310.53. From September 1, 1961 to August 31, 1962 the amount of the undercharge was \$392.21. During all the five years, this resulted in a net \$219.66 overcharge. As we understand it, \$107.34 was payment from the state and the county has issued a certificate of accuracy of the treasurer's account. The additional \$112.32 involves the county. The first question we wish to ask is whether or not Mr. Bell is liable for this amount, and if so, what procedure should be used in order to clarify the records in this matter. Mr. Bell has expressed a willingness and is ready to pay

Honorable Don Witt

whatever amount is determined to be owing to the county by him, but in view of the many different statutes involved, we would appreciate knowing the exact procedure to be followed in this situation."

The second question reads:

"On page 45-A appears that for the period of September 1, 1958 to August 31, 1959 there was an overpayment of clerical compensation in the amount of \$35.00 and from September 1, 1959 to August 31, 1960 an overpayment of clerical compensation in the amount of \$565.00. These amounts were not paid to the assessor but were paid by the county to the assessors employees after he requisitioned these amounts. There may have been some confusion as to the exact amount allowable because of a statutory change in the amount of compensation allowed for such clerical assistance. This matter appears to have been clarified in subsequent years, and occurred only in the periods mentioned. The question is whether or not the assessor is liable to the county for such amounts paid as clerical compensation, and what procedure should be used to correct the records of the county should he be liable. Again, Mr. Bell is able and willing to pay any amount due to the state and county because of this overpayment of clerical assistance."

Regarding your second question insofar as the assessor's liability for excess payments to his assistants, since they are paid by the county court we do not believe the assessor himself is liable therefor. Section 53.095, RSMo 1959.

Regarding both questions, they basically seem to be whether or not without any formal court action, the county court and the private individuals involved could agree upon a settlement amount to be paid to the county and dispose of this matter, in view of the various over- and under-payments revealed by the audit. We believe previous opinions of this office answer this in the affirmative.

It is clear from the facts as stated in your letter that the county has claim against the assessor and his assistants

Honorable Don Witt

for their overpayments, and that in turn the assessor has claim against the county for underpayments revealed by the audit. If suits were filed in court, the defendants in any given case could raise the applicable statute of limitations as a defense in view of the time expired since all the claims accrued. See Section 516.120 RSMo. 1959; Opinion No. 241, Bollinger, 10/1/65; Opinion to Dawes, 10/28/55, both enclosed.

The county is in fact legally bound to raise such affirmative statute of limitations defense on its behalf (Opinion No. 241, supra; Opinion No. 39, Henson, 9/13/54). It would thus appear that from a legal as well as practical standpoint, the various claims would be uncollectible in court if the defense of the statute of limitations were raised by the private parties as well as the county. However, the assessor as an individual could of course waive this defense.

It therefore appears that even without initiating formal civil court proceedings to collect these claims, a "settlement" by payment to the county of a sum agreed upon between the private individuals involved and the county court, is of course possible. See Opinion No. 89, Toohay, 11/14/61, enclosed.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Opinions to:

Dawes, 10/28/55
Bollinger, 10/1/65
Toohay, 11/14/61
Henson, 9/13/54

CIRCUIT COURT:
CIRCUIT CLERKS:
CIRCUIT COURT CLERKS AND
RECORDER OF DEEDS:
RECORDER OF DEEDS:
VACANCIES:

(1) During a vacancy in the office of the clerk of the circuit court and pending the appointment of a successor by the Governor and qualification of such officer, the circuit court may appoint a temporary circuit clerk; (2) Such an appoint-

ment where the offices of circuit clerk and recorder are combined, also constitutes the person appointed by the court ex officio recorder as a matter of law; (3) Such clerk appointed by the circuit judge is entitled to the emoluments of the office during the period he serves as circuit clerk and recorder of deeds; (4) The person appointed by the Governor to fill such a vacancy is not entitled to any emoluments of office until such time as he duly qualifies for such office.

OPINION NO. 23

November 6, 1969

Honorable Haskell Holman
Auditor of the State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your questions concerning the office of the circuit clerk of a county in which a vacancy was caused by death, to wit:

"... the records reveal that the successor to the office of circuit clerk, and ex-officio recorder was appointed by the Governor on July 21, 1967, but did not take the oath of office until July 27, 1967.

"The questions arising as a result of the circuit court order [that upon the death of the elected official, the deputy circuit clerk and ex officio recorder of deeds remain in office until a successor is appointed] and the variance between the date of appointment and the date the appointee took the oath of office are as follows:

"1. Would the individual appointed as deputy circuit clerk and ex-officio recorder be authorized to act and entitled to receive compensation from the county during the period the office was vacant, namely July 3 to July 26, inclusive, 1967?

Honorable Haskell Holman

"2. Would the individual appointed to fill the vacancy be entitled to receive compensation beginning on the date of appointment, July 21, or beginning on the date that the oath of office was taken, July 27, 1967?"

Section 483.020, RSMo, provides for the filling of a vacancy created by the death of an elected circuit clerk in the following manner:

"When any vacancy shall occur in the office of any clerk of a court of record so elected, by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, . . . "

Although the statutory power to fill the vacancy is vested exclusively in the Governor, courts possess broad power to act in the interest of self-preservation. The Missouri Supreme Court, in the case of Pogue vs. Swink, 284 S.W.2d 868, 872 (1955), held:

". . . Even in the absence of specific statutes upon the subject, courts of general jurisdiction have the inherent power to do all things reasonably necessary to preserve their existence and function as a court. . . and have the power to appoint necessary attendants, including clerks and janitors. . . "

The intent of the order by the circuit judge was clearly to appoint a temporary clerk of his court so that the court's business should not be interrupted pending action by the Governor. It is our opinion that the order was sufficient to effect this intent and authorize the appointee to act as the clerk of the circuit court even though the language of the order speaks of continuing to act in the capacity of deputy circuit clerk.

The offices of circuit clerk and recorder have been combined in such county pursuant to Section 59.040, RSMo 1959. Accordingly the individual lawfully occupying the office of clerk also has the authority to act as ex-officio recorder of deeds. Thus, such a person is de jure circuit clerk and ex-officio recorder and entitled to the emoluments of the office until a successor is duly appointed or elected and qualified.

Finally, with regard to your question concerning whether or

Honorable Haskell Holman

not the individual appointed by the Governor to fill the vacancy would be entitled to receive compensation beginning on the date of the appointment, or beginning on the date that the oath of office was taken, it is our opinion that such individual is not duly qualified until he takes the oath of office; and therefore, he is not entitled to any emoluments of the office until he qualifies.

In this respect, we refer to you our Opinion No. 93, dated May 13, 1963, issued to the Honorable Joe R. Ellis, copy enclosed, in which we held that the statutory amount established for the office merely fixes the rate of pay per annum and does not entitle the holder of that office to a full year's pay when he serves less than a year.

In this instance the clerk who was duly appointed by the court held the office until the governor's appointee was duly appointed and qualified. Coates vs. Parthman, 334 S.W.2d 417 (1960); State vs. Brown, 274 S.W. 965, 220 Mo. App. 468 (1925). Therefore, it is clear that the appointee of the Governor is not entitled to any of the emoluments of the office until he qualifies, and that the oath of office is a condition to qualification under Section 483.035, RSMo 1959.

CONCLUSION

It is therefore the opinion of this office that:

- (1) During a vacancy in the office of the clerk of the circuit court and pending the appointment of a successor by the Governor and qualification of such officer, the circuit court may appoint a temporary circuit clerk;
- (2) Such an appointment where the offices of circuit clerk and recorder are combined also constitutes the person appointed by the court ex officio recorder as a matter of law;
- (3) Such clerk appointed by the circuit judge is entitled to the emoluments of the office during the period he serves as circuit clerk and recorder of deeds;
- (4) The person appointed by the Governor to fill such a vacancy is not entitled to any emoluments of office until such time as he duly qualifies for such office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 93
Ellis, 5/13/63

DRIVER'S LICENSES:
LICENSES:
SUPREME COURT RULES:
CHANGE OF VENUE:
APPEALS:
DIRECTOR OF REVENUE:

That Section 564.444 RSMo Supp. 1967, is civil in nature. Supreme Court Rule 41.02 is explicit in directing that the Rules of Civil Procedure shall govern civil practice and procedure in the Circuit Courts. The Rules of Civil Procedure provide for change of venue and appeal.

It is our opinion that the Director of Revenue can apply for a change of venue or take an appeal in accordance with the provisions of the Rules of Civil Procedure in matters of judicial review of an order of revocation of a drivers license because of refusal to submit to a breath test issued under the provisions of Section 564.444.

March 25, 1969

OPINION NO. 24

Honorable Lawrence O. Davis
Prosecuting Attorney
Franklin County
Post Office Box 229
Court House
Union, Missouri



Dear Mr. Davis:

This letter is in response to your request for an opinion as to procedure in matters of judicial review of an order of the Department of Revenue revoking a driver's license under Section 564.444 RSMo Supp. 1967, because of a refusal to submit to a chemical breath test.

Your question regards proceedings for judicial review under the provisions of Section 564.444 which would be filed in a Court of record, in this instance a Circuit Court.

Your specific question is as follows:

"My question is whether or not the Director of Revenue can appeal an adverse decision or apply for a change of venue as in ordinary proceedings?"

The answer to this question is, "yes." The Director of Revenue can appeal an adverse decision or apply for a change of venue.

Provision for judicial review of an order of the Department of Revenue revoking a driver's license under Section 564.444 is stated in paragraph two thereof as follows:

"If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting

officer. At the hearing the judge shall determine only:

1. Whether or not the person was arrested.
2. Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition.
3. Whether or not the person refused to submit to the test."

Sections 564.441 through 564.444 are civil in nature. They provide a method whereby an operator's driving license may be suspended or revoked for refusal to submit to a sobriety test and for judicial review of such administrative action. See *Blydenburg vs. Thomas A. David*, Director of the Department of Revenue, 413, SW 2nd 284.

Supreme Court Rule 41.02 provides in part as follows:

"Unless otherwise hereafter provided by statute, the Rules of Civil Procedure shall govern the practice and the procedure in all suits and all proceedings of a civil nature, legal, equitable and special in the following courts: Supreme Court, Courts of Appeals, Circuit Courts, and Courts of Common Pleas."

"The language of Civil Rule 41.02 is explicit in directing that the rules of Civil Procedure shall govern practice and procedure in all suits and all proceedings of a civil nature, legal, equitable and special. We are convinced that the intention of the Supreme Court in establishing this rule was to bring into application in special proceedings those Civil Rules it was simultaneously establishing which were consistent with such proceedings and not repugnant to them." *State of Missouri v. Hon. J. Doerr Ewing*, 404 SW 2nd 433.

Civil proceedings in the Circuit Courts are to be governed by the Rules of Civil Procedure, Civil Rules 41, through 102, inclusive. These rules make provision for appeal and change of venue. It is our opinion that there is no provision in Section 564.444 or elsewhere in the statutes which would exclude judicial review of an order issued under the provisions of Section 564.444 from being governed by the provisions of the Rules of Civil Procedure, providing for appeal and change of venue.

CONCLUSION

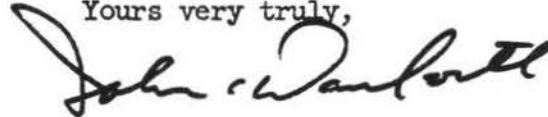
Therefore, it is the opinion of this office that Section 564.444 RSMo Supp. 1967, is civil in nature. Supreme Court Rule 41.02 is explicit in directing that the Rules of Civil Procedure shall govern civil practice and procedure in the Circuit Courts. The Rules of Civil Procedure provide for change of venue and appeal. It is our opinion that the Director of Revenue can apply for a change of venue or take an appeal in accordance with the pro-

Honorable Lawrence O. Davis

visions of the Rules of Civil Procedure in matters of judicial review of an order of revocation of a driver's license because of refusal to submit to a breath test issued under the provisions of Section 564.444.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joe R. Ellis.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

DIRECTOR OF REVENUE:
DRIVERS LICENSE:
JUDGMENTS:
MOTOR VEHICLE SAFETY
RESPONSIBILITY:

An unsatisfied judgment of a magistrate court warrants suspension of driving privileges of the defendant until it is satisfied, released, or until a period of ten years expires after rendition or revival of said

judgment or from the date of the last payment on the judgment. Failure of the plaintiff to revive such judgment after three years in no way affects the suspension of driving privileges contemplated by the Motor Vehicle Safety Responsibility Law.

OPINION NO. 25

March 11, 1969

Honorable Thomas A. David
Director, Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. David:

This is in response to your recent request for an opinion of this office. Your request reads as follows:

"It has been the practice of the Safety Responsibility Unit of this department that when a persons driver's license has been suspended under Chapter 303 because of an unsatisfied judgement in a magistrate court, that the unit hold the license in suspension for a period of 10 years from the date of the rendition of the judgement. As you are aware, an execution can issue on a magistrate court judgement for a period of 3 years from the date of rendition and a magistrate court judgment can be revived any time during a period of 10 years of date of rendition.

"We would like to have your official opinion on the following question: Should the Safety Responsibility Unit of this department consider a magistrate court judgement null and void after 3 years and lift the suspension of the licenses or should that unit follow their present practice of holding the licenses in suspension for 10 years?

"If you interpret the law to mean that we must lift the suspension at the end of 3 years then

Honorable Thomas A. David

what would the unit have to do to comply with the law if sometime during the period of 10 years and after the expiration of 3 years and after the suspension had been lifted the plaintiff revives the judgement so that execution can be issued for another 3 years? Would this unit have to issue a new expiration or not?"

For reasons hereinafter stated, we are of the opinion that your present policy is not only warranted but required by law.

Sections 303.090 and 303.100, RSMo and 303.110, RSMo Supp. 1967, set out the procedure whereby the Director of Revenue shall suspend the driving privileges of a person who fails to satisfy a judgment against him within sixty days after it becomes final. (The type of judgment contemplated is, of course, one for ". . . damages arising out of the ownership, maintenance or use of any motor vehicle; . . ." Section 303.020 (3), RSMo Supp. 1967). The suspension remains in effect as long as the judgment remains unsatisfied or until a conclusive presumption of satisfaction arises (as hereinafter discussed), or until the occurrence of certain other contingencies not relevant to this inquiry. Section 303.110, RSMo Supp. 1967.

It is correct that execution can issue on the judgment of a magistrate court only within three years of rendition thereof, unless the judgment is properly revived. Section 517.810, RSMo, reads as follows:

"No plaintiff nor his legal representative shall, at any time after the expiration of three years from the rendition of a judgment by any magistrate, sue out an execution thereon, unless such judgment shall be revived as herein directed."

A close reading of the foregoing section reveals that it does not nullify the judgment but simply imposes an additional requirement on the manner of enforcing it after three years, i.e., the necessity for formally "reviving" the judgment. Under the procedures for reviving the judgment, the burden is on the judgment-debtor ". . . to show cause, if any he has, why such judgment should not be revived; . . ." Section 517.830, RSMo. The only statutory grounds for denial of an order reviving the judgment is where the defendant can ". . . show and establish that the judgment has been paid or satisfied. . ." Section 517.850, RSMo. Thus, as contemplated by the statutes, the judgment, even after the running of the three year period, is presumed unsatisfied (and, therefore, is in effect) unless the contrary is shown and established.

Moreover, since Section 517.810 governs only the method by which a plaintiff may collect his judgment after three years, we do not believe that such considerations should in any way affect the performance of your duties with respect to the suspension of driving

Honorable Thomas A. David

privileges. It might also be noted that we are fortified in this conclusion by the closing sentence of Section 303.110 which reads:

" . . . A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment-debtor from any of the requirements of this chapter."

That is to say, the performance of the functions of the director is in no way contingent upon the practical aspect of collectibility of the judgment in question.

On the other hand, Section 517.870, RSMo, states in part " . . . that no judgment shall be revived after the lapse of ten years from the rendition thereof, or from the date such judgment may have been last revived," And under the terms of Section 516.350, RSMo, a judgment is "conclusively presumed to be paid" after ten years have elapsed after the rendition of judgment, revival upon personal service, or last payment thereon.

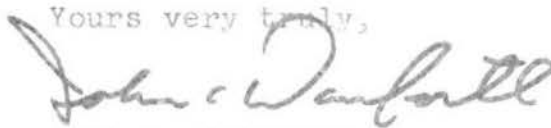
Hence, until ten years have elapsed after any of the events contemplated in Sections 517.870 and 516.350, supra, an unsatisfied judgment requires suspension of driving privileges unless such privileges are restored by some other procedure provided for by Chapter 303.

CONCLUSION

It is therefore the opinion of this office that the three year period contemplated by Section 517.810, RSMo, in no way affects or limits the functions of the Director of Revenue with respect to the suspension of driving privileges on the basis of an unsatisfied judgment of a magistrate court. However, such judgment is conclusively presumed to be satisfied after ten years have elapsed from the rendition of such judgment or from the date of revival or from the date of the last payment on the judgment and a suspension of driving privileges would terminate upon the passage of such ten year period.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

LIQUOR CONTROL:
INTOXICATING LIQUOR:
NONINTOXICATING BEER:
LICENSES:

The State Director of Liquor Control has no authority to deny a license to a person to sell intoxicating liquor or nonintoxicating beer under Section 311.060, RSMo and 312.040, RSMo, because such person has been convicted of violating a city ordinance relating to the manufacture or sale of intoxicating liquor or nonintoxicating beer.

OPINION NO. 27

February 25, 1969

Honorable Harry Wiggins, Supervisor
State Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wiggins:

This is in response to your request for an opinion from this office which in part states as follows:

"Section 311.060, Revised Statutes of Missouri, deals with the qualifications required of persons seeking licenses under the intoxicating liquor laws and Section 312.040 deals with applications under the nonintoxicating beer laws. Each section contains identical language regarding convictions:

'No person shall be granted a license hereunder. . .who has been convicted, since ratification of the twenty-first amendment to the Constitution of the United States, of a violation of any law applicable to the manufacture or sale of intoxicating liquor (or non-intoxicating beer). . .'

"The question arises whether the above section applies to conviction in municipal or city courts where violations of municipal statutes and/or ordinances are involved. There are cases where concurrent jurisdiction is involved and where local authorities wish to proceed on cases they have investigated by filing the charges in the municipal courts.

Honorable Harry Wiggins

"Since the statute specifically applies to 'any law' I would request your official legal opinion on this question."

The manufacture or sale of intoxicating liquor is governed by Chapter 311, RSMo. Section 311.050 makes it unlawful for any person, firm, partnership or corporation to manufacture or sell intoxicating liquor in any quantity without taking out a license. Section 311.060 provides in part:

"1. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, or a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid; * * *"

Section 311.220 provides in part that cities may charge for licenses issued and provides for the collection of the fee and makes and enforces ordinances for the regulation and control of the sale of all intoxicating liquors within their limits and provides for penalties for the violation of such ordinances not inconsistent with the provisions of Chapter 311, RSMo.

Section 311.880, RSMo, provides that it shall be a misdemeanor for any person to violate the provisions of Chapter 311, RSMo.

Chapter 312, RSMo, governs the manufacture and sale of non-intoxicating beer. Section 312.040 provides in part:

"No person shall be granted a permit or license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village nor shall any corporation be granted a permit or license hereunder unless the managing

Honorable Harry Wiggins

officer of such corporation is of good moral character and a qualified legal voter and tax-paying citizen of the county, town, city or village, and no person shall be granted a permit or license hereunder whose permit or license as such dealer has been revoked, or, who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, or a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor or nonintoxicating beer, or who employs in his business as such dealer, any person whose permit or license has been revoked or who has been convicted of violating such law since the date aforesaid: * * *

Section 312.140, RSMo, provides that cities may charge for licenses for the sale of nonintoxicating beer within its limits and makes and enforces ordinances for the regulation and control of the sale of nonintoxicating beer within their limits not inconsistent with the provisions of Chapter 312, RSMo and provides penalties for their violation.

Section 312.500, RSMo, provides that it shall be a misdemeanor for any person to violate the provisions of Chapter 312, RSMo.

The question submitted is whether a person violating a city ordinance, enacted by the city to regulate and control the sale of intoxicating liquor and nonintoxicating beer, comes within the provisions of Section 311.060 and Section 312.040, supra, which prohibit the Supervisor of Liquor Control from issuing a license to a person who has been convicted of any law applicable to the manufacture and sale of intoxicating liquor or nonintoxicating beer. In substance the question is whether the words "any law" as used in these statutes include a municipal ordinance.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Kasten v. Guth*, 375 S.W.2d 110. In 53 C.J.S., Licenses, paragraph 13(b), the rule of construction of statutes and ordinances regarding licenses is stated in part as follows:

"Statutes and ordinances imposing licenses and business taxes are generally to be construed liberally in favor of the citizen and strictly against the government, whether state or municipal, especially where they provide penalties for their violation. Accordingly, if the enactment is not clear and positive in its terms,

Honorable Harry Wiggins

or if it is reasonably open to different interpretations through the indefiniteness of its provisions, every doubt as to construction must be resolved in favor of the one against whom the enactment is sought to be applied."

It is our view that the statutes under consideration, since they provide for a penalty for the violation, should be strictly construed against the government and in favor of the individual.

In *Werner v. Pioneer Cooperage Company*, 155 S.W.2d 319, the St. Louis Court of Appeals construed a statute regarding Workmen's Compensation which provides as follows:

"* * * 'Where the injury is caused by the failure of the employer to comply with any statute in this state, or any lawful order of the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen per cent.'"

The City of St. Louis had enacted an ordinance in regard to safety valves on a boiler with which the employer had not complied. In discussing the meaning of the statute, the court stated, l.c. 324, paragraph 8-9:

"We are of the further opinion that the Ordinance of the City of St. Louis could in no event have any application to the provisions of Section 3301, R.S.1929, now 3691, R.S.1939, which provides for a penalty for failure to 'comply with any statute in this state.' Regardless of what may be the technical meaning of the words 'statute' and 'ordinance' as used in other jurisdictions, when used in our State they have a definite and distinct meaning to both lawyer and layman; a statute being a law enacted by the State Legislature, and an ordinance being a by-law passed or ordained by a city council and under authority of a statute giving it the right to pass such ordinance. The penalty provision could only refer to the failure of an employer to comply with a statute in and of the State. Any other construction would lead to the anomalous situation of penalizing an employer engaged in business in a city which has an ordinance such as the one here relied upon, whereas other employers in the State would not be penalized for precisely the same thing. We think the penalty was designed to apply to a failure to comply with statutory law of the State."

Honorable Harry Wiggins

In State ex rel McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, the Supreme Court held the constitutional provision that the Attorney General shall perform such duties as may be prescribed by "law" means statutes enacted by the legislature.

The violation of a city ordinance is not a crime in the constitutional sense nor a misdemeanor under our criminal code. City of Ava v. Yost, 375 S.W.2d 884; Marshall v. Kansas City, 355 S.W.2d 877. Violations of municipal police regulations are not "crimes." Delaney v. Police Court of Kansas City, 167 Mo. 667, 67 S.W. 589.

We believe that the words "any law" as used in the above statutes do not include a city ordinance because the legislature, in enacting this statute, did not intend that the words "any law" include city ordinances. We believe the word "law" as used applies only to state and federal statutes. The statutes, referred to above, that give the municipality authority to enact ordinances for the regulation and control of the sale of intoxicating liquor and nonintoxicating beer expressly provide that the city may provide penalties for their violation. We do not believe that it was intended that a violation of such ordinances should result in a denial of the issuance of a license by the Director of Liquor Control.

CONCLUSION

It is the opinion of this department that the State Director of Liquor Control has no authority to deny a license to a person to sell intoxicating liquor or nonintoxicating beer under Section 311.060, RSMo and 312.040, RSMo, because such person has been convicted of violating a city ordinance relating to the manufacture or sale of intoxicating liquor or nonintoxicating beer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

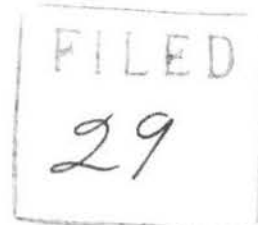
NATIONAL GUARD:
MOTOR VEHICLES:

Section 304.265, RSMo, makes unlawful the operation by a member of the Missouri National Guard of trucks and truck-tractor trailers in possession of the Missouri National Guard unless such vehicles are equipped with rear fenders or mud flaps, regardless of whether the vehicles are owned by the State of Missouri or the United States.

OPINION NO. 29

August 11, 1969

L. B. Adams, Jr., Major General
Adjutant General's Office
Broadway State Office Building
Jefferson City, Missouri 65101



Dear General Adams:

This is in response to your request for an opinion as to the applicability of Section 304.265, RSMo Supp. 1967, to National Guardsmen operating vehicles of the Missouri Guard which do not have rear fenders or mud flaps.

The above statute reads as follows:

"1. It shall be unlawful for any person to operate upon the public highways of this state a truck or truck-tractor trailer, without rear fenders, which is not equipped with mud flaps for the rear wheels. If mud flaps are used, they shall be wide enough to cover the full tread width of the tire or tires being protected; shall be so installed that they extend from the underside of the vehicle body in a vertical plane behind the rear wheels to within eight inches of the ground; and shall be constructed of a rigid material or a flexible material which is of a sufficiently rigid character to provide adequate protection when the vehicle is in motion. No provisions of this section shall apply to a motor vehicle in transit and in process of delivery equipped with temporary mud flaps.

"2. Any person who violates this section is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law."

You state in your letter that the vehicles in question are owned by the Federal Government and are issued to the state for National Guard use, but that they remain the property of the United States and may be withdrawn and distributed elsewhere by the Secretary of the Army or Air Force. This conclusion as to ownership has strong support in the following statutes:

L. B. Adams, Jr., Major General

"(a) All military property issued by the United States to the National Guard remains the property of the United States." (32 USC, §710 (a))

"(c) Whenever he finds it to be in the best interest of the United States, the Secretary of the Army or the Secretary of the Air Force, or his representative, may issue to the Army National Guard or the Air National Guard, as the case may be, supplies of the armed forces under his jurisdiction that are in addition to supplies issued to that National Guard under section 702 of title 32 or charged against its appropriations under section 106 or 107 of title 32, without charge to the appropriations for those components for the cost or value of the supplies or for any related expense.

"(d) Supplies issued under subsection (b) or (c) may be repossessed or redistributed as prescribed by the Secretary concerned." (10 USC, Section 2511, (c) (d)).

Since we do not deem this to be a decisive issue, we will assume for the purposes of this opinion that the vehicles are the property of the Federal Government.

However, the National Guard of Missouri is an agency of the State of Missouri.

"The governor shall be the commander-in-chief of the militia, except when it is called into the service of the United States, and may call out the militia to execute the laws, suppress actual and prevent threatened insurrection, and repel invasion." (Article IV, Section 6, Mo. Const. 1945)

"2. The organized militia shall consist of the following:

"(1) Such elements of the land and air forces of the National Guard of the United States as are allocated to the state by the President or Secretary of Army or Air, and accepted by the state, hereinafter to be known as the national guard and the air national guard." (Section 41.070, RSMo 1959)

L. B. Adams, Jr., Major General

"The National Guard is the modern Militia reserved to the States by Art 1, § 8, cl 15, 16, of the Constitution. It has only been in recent years that the National Guard has been an organized force, capable of being assimilated with ease into the regular military establishment of the United States. From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces. The passage of the National Defense Act of 1916 materially altered the status of the militias by constituting them as the National Guard. Pursuant to power vested in Congress by the Constitution (see n. 8), the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being 'federalized' by units, rather than by drafting individual soldiers. In return, Congress authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. The Governor, however, remained in charge of the National Guard in each State except when the Guard was called into active federal service; in most instances the Governor administered the Guard through the State Adjutant General, who was required by the Act to report periodically to the National Guard Bureau, a federal organization, on the Guard's reserve status. The basic structure of the 1916 Act has been preserved to the present day.

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"It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held. . . ." (Maryland v. United States, 381 U.S. 41, 46-47 (1965)).

L. B. Adams, Jr., Major General

Therefore, the state, not the Federal Government is in custody of, and operates these vehicles.

It has long been held that the supremacy clause in Article VI of the United States Constitution prevents a state from imposing restrictions on the Federal Government or its agents. This rule has been generally followed even in areas of highway and traffic laws enacted by the states.

In 1920, the United States Supreme Court denied the power of the State of Maryland to require that a United States postal employee, driving a government vehicle, have a state operator's license.

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. . . ." (Johnson v. Maryland, 254 U.S. 51, 57 (1920)). (Emphasis added).

In 1921, a Federal District Court held that a mail truck driver, employed by the United States Postal Department, could not be convicted of violating an Ohio statute requiring a certain type of headlight to be used on highway vehicles. The truck was owned by the United States, and the employee was required to drive the truck in order to perform his duties.

"To affirm that the authority of the Postmaster General in carrying out the power conferred upon him by Congress is subordinate to the various state laws would be to say that the federal government is not supreme in the selection of instrumentalities for the carrying of the mail. * * * Therefore it must be concluded that the order of the Postmaster General prescribing oil headlights of the type on the truck Willman was driving was a valid exercise of general authority pursuant to law, and that what Willman did in obedience thereto was done pursuant to the laws of the United States, and consequently that he is immune from prosecution by the state for so doing." (Ex parte Willman, 277 Fed. 819, 823 (DCSC, Ohio, 1921)).

The immunity of the United States to restrictive state statutes extends beyond the federal employees. The United States Supreme Court has ruled that a constructor on a Federal construction project in Arkansas was not required to obtain an Arkansas contractor's license. (Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956)).

L. B. Adams, Jr., Major General

In 1963, the Court struck down a Georgia law which prohibited common carriers from allowing reduced rates for the shipment of more than one family's household goods insofar as it interfered with contracting between the General Services Administration and common carriers, for the transportation of Federal Government employee's household goods at rates below the Georgia schedule. (United States v. Georgia Public Service Commission, 371 U.S. 285, 1963)).

It should be noted, however, that in all of the foregoing cases, as well as all related cases we have found, that the only state regulatory laws struck down as incompatible with the supremacy clause or held inapplicable to the Federal Government, its agents, suppliers, or employees, were statutes which placed a restriction on the operation of a recognized function of the Federal Government.

State statutes have been held applicable to federal employees when the violation of such statute was not necessary to the performance of their duties as federal employees. This includes instances where the violation was committed in the performance of these duties (violation of traffic laws while transporting the mails) but was not necessary to the performance of such duties.

Commonwealth v. Closson, 118 N.E. 653 (Mass. 1918);
Hall v. Commonwealth, 105 S.E. 551 (Va. 1921);
State v. Willingham, 143 F.Supp. 445 (D.C. Okla. 1956);
Cline v. United States, 214 F.Supp. 66 (D.C. Tenn. 1962).

In several cases concerning United States' property, the federal courts have ruled that local regulations were inapplicable. However, in each case we have found, the fact that federal property was involved was not considered as decisive. Instead, the courts looked to see if the statute restricted federal functions or disposition of such property.

"... local rent control legislation does not affect property of the United States administered by a federal agency." (Grammer v. Virgin Islands Corporation, 235 F.2d 27, 29 (3rd Cir. 1956)). (Emphasis added).

"Since the United States is a government of delegated powers, none of which may be exercised by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any one state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause

L. B. Adams, Jr., Major General

of the Constitution states this essential principle. Article 6. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. . . ." (Mayo v. United States, 319 U.S. 441, 445 (1943)). (Emphasis added).

There is authority for the proposition that a federal employee can be convicted of violating a state maximum vehicle weight statute even though the vehicle is federal property, and the federal employee must violate the statute in order to perform his duties. (Commonwealth of Virginia v. Stiff, 144 F.Supp. 169 (W.D. Va. 1956)). However, in this opinion, we need not decide if this case should be followed completely.

Since Section 304.265, RSMo, does not attempt to regulate any federal activity or impose any restriction on any function of the Federal Government, we believe there is no conflict between the United States Constitution and the statute when applied to Missouri National Guardsmen operating federally owned vehicles issued to the State of Missouri. Thus, the question arises as to whether or not the statute should be applied to state agencies.

A general rule of statutory construction is that governmental units are not within the scope of a statute unless an intention to include them is clearly manifest, especially where prerogatives, rights, titles, or interest of the state would be divested or diminished. (82 C.J.S., Statutes, §318, pp. 555-558).

However, Missouri Courts have tended to disregard this rule when construing highway traffic statutes.

In 1942, the Missouri Supreme Court sitting en banc held that the Missouri Drivers License Act applied to state agents and employees even though there was evidence that such a ruling would cost the state an extra \$35,000 per year.

"Appellants contend that the Drivers' License Act does not expressly mention the state and its agencies and therefore should not be held to include them. That is a rule for statutory construction, still retained by the courts, but which has been somewhat relaxed in modern times.

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". . . There is just as much danger to the public in the operation of a state owned car as one which is privately owned. . . ." (Department of Penal Institutions v. Wymore, 165 S.W.2d 618 (Mo. en banc 1942)).

L. B. Adams, Jr., Major General

In 1961, this decision was reaffirmed in holding that the Missouri Motor Vehicle Safety Responsibility Law, Chapter 303, RSMo 1959, applied to municipal employees acting within the scope of their employment. In so holding, the court stated:

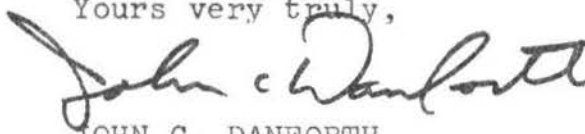
"If the general assembly had intended to make Chapter 303 inapplicable to municipal employees operating motor vehicles owned by the municipality, it could have done so clearly and unmistakably as it has done in other similar instances. . . ."
(City of St. Louis v. Carpenter, 341 S.W.2d 786, 790 (Mo. Div. 2, 1961)).

Since the purposes of Chapters 301, 303, and 304, RSMo, are to promote traffic safety and responsibility, we believe, in light of the foregoing cases, that Section 304.265, RSMo, is applicable to employees of state agencies.

CONCLUSION

It is the opinion of this office that Section 304.265, RSMo, makes unlawful the operation by a member of the Missouri National Guard of trucks and truck-tractor trailers in possession of the Missouri National Guard unless such vehicles are equipped with rear fenders or mud flaps, regardless of whether the vehicles are owned by the State of Missouri or the United States.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answered by Letter-Nowotny

February 17, 1969



OPINION LETTER NO. 32

Senator Donald L. Manford
9409 Oakland
Kansas City, Missouri 64138

Dear Senator Manford:

This is in answer to your request for an opinion of this office as to the constitutionality of the Kansas City Earnings Tax.

The Kansas City Earnings Tax is provided for by Sections 92.210 through 92.300, RSMo Supp. 1967. Section 92.210, supra, states that constitutional charter cities of a certain size (of which Kansas City is one) are authorized to levy and collect, by ordinance, an earnings tax. Section 92.300, supra, provides that no ordinance shall be effective unless authorized by the city charter.

Section 19, Article VI, Constitution of Missouri, provides in part:

"Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state, in the following manner:
* * *

Kansas City adopted its charter pursuant to this constitutional provision.

The power to tax is in the state and may be delegated by constitutional provision or statutory enactment. A city has no inherent power to tax. The authority to tax must be expressly granted or necessarily incident to the powers conferred. *Siemens v. Shreeve*, 317 Mo. 736, 296 S. W. 415 [1-3] (1927). An earnings tax is not a licensing or regulatory measure but is essentially a revenue measure and is a species of income or excise tax. *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 203 S. W. 2d 438, 440 [1] (1947); *Lawyers' Association of St. Louis v. City of St. Louis*, Mo. App., 294 S. W. 2d 676, 682 (1956).

Senator Donald L. Manford

The Kansas City Earnings Tax was recently the subject of controversy in *Grant V. Kansas City, et al., Mo. En Banc, 431 S. W. 2d 89 (1968)*. There, the question was whether Kansas City could amend its charter to authorize an increase in the earnings tax beyond the statutory limit provided in Section 92.230, supra, without an amendment to Section 92.230. The Court held that the proposed amendment to the Kansas City charter did not involve a matter of purely local concern and was invalid in view of Section 92.230 and in view of the constitutional provision that charters adopted by constitutional charter cities must be consistent with the constitution and laws of this state. The Court, though not directly ruling on the question, necessarily implied that the present Kansas City Earnings Tax is within the existing constitutional and statutory grants.

Finally, the St. Louis Earnings Tax, which is similar to the Kansas City Earnings Tax (See Sections 92.110 through 92.200, RSMo), has been held to be constitutional by the Supreme Court, En Banc, in two cases, *Walters v. City of St. Louis, 259 S. W. 2d 377 (1953)* and *Arnold v. Barra, 366 S. W. 2d 321 (1963)*.

It is our opinion that the Kansas City Earnings Tax is authorized by and consistent with the above discussed constitutional and statutory provisions. We find no constitutional provisions violated by the earnings tax.

Very truly yours,

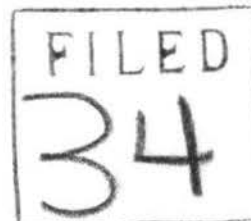
JOHN C. DANFORTH
Attorney General

GAMBLING DEVICES:
GAMBLING:
LOTTERIES:
BINGO:
KENO:
LIQUOR LICENSE:
LIQUOR: .

Regulation No. 15(k) of the Supervisor
of Liquor Control of Missouri prohibits
any licensee from having any "Bingo"
device upon his licensed premises.

OPINION NO. 245(1968)
34(1969)

January 28, 1969



Honorable Harry Wiggins
Supervisor, State of Missouri
Department of Liquor Control
Jefferson City, Missouri 65101

Dear Mr. Wiggins:

This opinion is in response to your question concerning whether or not the playing of "Bingo" on premises licensed by the Department of Liquor Control is a violation of the rules of the Supervisor of Liquor Control.

The pertinent portion of your request states specifically as follows:

"This office has recently received complaints regarding alleged gambling on premises licensed by the State of Missouri to sell intoxicating liquor and beer. Investigation has revealed that the alleged gambling consists in each case of a game known as 'Bingo'.

"At hearings held recently in Kansas City, various licensees appeared with counsel and readily admitted the use of 'Bingo' on their licensed premises. The facts are not in dispute and the general nature of the game can, I believe, be summarized in one paragraph.

"The system appears to be that on certain nights, and between specified hours, all adult customers received what is commonly referred to as a 'Bingo' card. There is no charge for this card and patrons are supposedly not required to make any purchase on the premises to participate (May I interject here, however, that common sense

Honorable Harry Wiggins

would seem to dictate that the games would not persist for long if the premises were filled each time with non-paying customers). Various games are played during the evening--all involving covering numbers on the cards as called by the announcer. Winners are awarded prizes of merchandise with various values or cash in varying amounts, depending upon the game itself.

"The licensees contend that this procedure does not constitute a form of gambling which would violate any of the state liquor laws or the rules of regulation of this department."

The applicable regulation of the Supervisor of Liquor Control is Regulation No. 15(k) which states:

"Gambling and Gambling Devices.--No licensee shall allow upon or about his licensed premises, any gambling of any kind or character whatsoever in which the one who plays stands to win or lose money, trade checks, prizes, merchandise or any other consideration whatsoever.

"No licensee shall have any gambling devices upon his licensed premises whereby money, trade checks, prizes, merchandise or property or any other consideration whatsoever may be won or lost."

Our legislature provided in Section 563.370, RSMo 1959, that "Keno" is a gaming device. This section states:

"Keeping gaming device--penalty.--Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit

Honorable Harry Wiggins

any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not more than one year."

"Keno" is in fact the same game as "Bingo." We reached this conclusion in our Opinion No. 97, dated August 27, 1949, to the Honorable Homer F. Williams, copy enclosed.

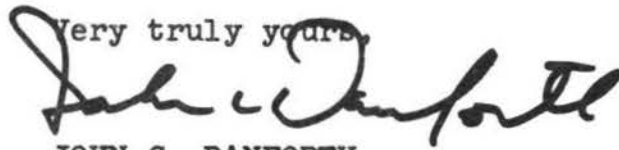
We therefore conclude that "Bingo", per se, is a gambling device and as such it is inherently a device whereby money, trade checks, prizes, merchandise or property or any other consideration whatsoever may be won or lost.

The conclusion therefore naturally follows that such a licensee who shall have any such gambling device upon his licensed premises is in violation of Regulation No. 15(k).

CONCLUSION

It is the opinion of this office that Regulation No. 15(k) of the Supervisor of Liquor Control of Missouri prohibits any licensee from having any "Bingo" device upon his licensed premises.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 97
Williams, 8/27/49

- SCHOOLS: 1. The power of a public school board to employ
TEACHERS: teachers includes the discretion to grant tem-
SABBATICAL LEAVE: porary leaves of absence with or without pay sub-
PUBLIC SCHOOL ject to the limitations of other applicable laws.
RETIREMENT SYSTEM:
STATE AID: 2. Leave of absence must be set out in writing
and incorporated in the employment contract
between the board and the teacher. The leave cannot be a gratuity,
but must be in exchange for service rendered by the teacher during
the contract period.
3. Leave agreements by school boards of St. Louis County must
be in accord with requirements of Sections 168.191, RSMo Supp. 1967,
which limits the terms of teaching contracts.
4. Public school teachers' retirement system contributions under
Section 169.010, et seq., RSMo should be calculated during the teacher's
leave of absence in the same manner as contributions are calculated
during periods of actual service.
5. A temporary leave of absence of a teacher employed on a regular
full-time basis does not affect the eligibility of the school district
for state aid known as "Teacher Preparation Allowance" under subsection
2 of Section 163.031, RSMo Supp. 1967.

OPINION NO. 35

March 18, 1969

Honorable Harlan A. Gould
Representative - 45th District
Room 201I Capitol Building
Jefferson City, Missouri 65101



Dear Representative Gould:

This official opinion is issued in response to the request of your predecessor as Representative for the 45th District, Robert O. Snyder, which request was renewed by you. A ruling is asked upon the matter of sabbatical leave for public school teachers of six-director school districts within St. Louis County. The request also contains numerous ancillary questions and reads as follows:

Honorable Harlan A. Gould

"Please give me an opinion on whether or not a six-director school district in St. Louis County, Missouri, may legally grant a sabbatical leave to a teacher with full pay or part pay, for one or more school semesters or school years, for the purpose of professional improvement which shall directly benefit the school district involved or for any other purpose.

"I would also like to be advised whether the answer to the foregoing question would depend, in any way, on a requirement that, to qualify, a teacher would have to have been employed full time by the district for a specified number of school years and would have to agree to return to the district, after the leave, and teach for a specified number of school years, in the district, refunding all or a portion of such leave pay if this commitment were not kept.

"Further, if the foregoing were legal, would it be legal for the district to agree, at the time the leave is granted, to accept back and retain the teacher on its staff for the term of the teacher's post-leave commitment?

"Assuming the foregoing were legally possible, on what basis could the amounts of the district and teacher payments under the retirement system be computed? Could they be based on the full amount of the teacher's salary for the year preceding the beginning of the sabbatical leave?

"And, finally, what effect, if any, would such leave with pay have on the amount of state aid for the district?"

You also requested our consideration of several cited constitutional provisions, statutes and court decisions.

We do not find that the phrase "sabbatical leave" has any precise legal definition. Although the phrase at times refers to a leave taken during the seventh year of service, the phrase is also used to refer to any period of rest. Webster's Third International Dictionary Unabridged (1961). Thus we shall consider sabbatical leave in the context of this opinion to mean any authorized leave of absence with full or partial pay for the purpose of professional improvement.

Public school boards have only such power as is expressed within the terms of the statutes or as may be implied by necessary implication, Wright, et al. v. Board of Education of St. Louis, Mo., 246 S.W. 43, 45. No statute of this state expressly provides for the granting of

Honorable Harlan A. Gould

sabbatical leave to public school teachers. Thus, we turn to consideration of the implication of existant statutes.

The statutes generally governing the employment of public school teachers are Sections 168.101 and 168.111, RSMo Supp. 1967. In addition to these two general statutes, Section 168.191 is applicable to certain districts within counties of the first class. (St. Louis County is a county of the first class).

Section 168.101 provides that a school board "may contract with and employ legally qualified teachers for and in the name of the district. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid * * * ."

These statutes do not direct in specific detail what may or may not be the terms of employment of a public school teacher. The legislative grant is in general terms, thereby leaving to the school boards the exercise of discretion as to the particular terms and conditions of the employment contract.

We are of the opinion that it is within the discretion of the school boards to grant temporary leaves of absence with or without pay subject to the limitations of other applicable laws.

Such leave must be by agreement in writing and incorporated in the employment contract between the board and the teacher. The leave cannot be a gratuity, rather it must be in exchange for service rendered by the teacher. The service rendered in exchange for the leave must be rendered during the contract period. Leave cannot be granted in consideration of past services.

Section 432.070, RSMo 1959, provides as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

Honorable Harlan A. Gould

Any leave of absence agreement between the school board and a teacher should be specified in writing in the employment contract. This may be done by incorporating by reference provisions of the rules and regulations of the school board governing leaves of absence. Oral arrangements are invalid and contrary to Section 432.070. See also Opinion No. 71, Pinnell, 5-7-51, and Opinion No. 41, Holman, 8-20-56 (copies enclosed).

A public school board cannot give away public funds for any purpose. Article VI, Section 25, Missouri Constitution 1945 provides:

" * * * No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except (Exceptions not applicable here) * * * ."

A gratuity or gift to a teacher by the public school board is unlawful, Opinion No. 21, Dawson, 5-10-39 (copy enclosed).

The board of education is also prohibited from paying additional compensation for services that have been already rendered. Article III, Section 39(3), Missouri Constitution 1945, provides:

"The general assembly shall not have power:

* * * * *

(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

Also, see: Section 432.070, supra; Opinion No. 16, Chamier, 4-23-38 (copy enclosed).

It is our information that public bodies commonly provide for vacations, leaves and sick leave for public employees as part of the employment contract. Also, it is a common practice for school boards to pay teachers in twelve monthly installments although the teacher may be required to actively serve only during nine or ten months of the year. We assume that under this practice, a teacher who would actually serve twelve months would receive a higher compensation than an equivalent teacher who serves only nine months.

The law requires that public funds be paid only in exchange for actual service. However, this does not prohibit the compensation from being paid in so many dollars and so many days paid vacation or leave so long as both compensations are in exchange for the service rendered.

Honorable Harlan A. Gould

It might be contended that sabbatical leave serves a significant public purpose in addition to the private benefit to the teacher in that the pupils in school will benefit from the increased competency of the teacher. However, such declarations of public policy are within the domain of the legislature. The rulings of this office must be based upon existing statutes. Our ruling here is limited to leaves of absence which are based upon contract consideration.

As we have stated above, a leave of absence with pay is authorized only as part of the term of the employment contract. We are informed by the State Department of Education that all school districts within St. Louis County are six-director districts maintaining approved high schools employing full-time superintendents. Therefore, all school districts within St. Louis County are governed by Section 168.191, RSMo Supp. 1967, which reads:

"In all counties of the first class, any school board, other than boards in urban districts, in charge of a public school system maintaining a classified high school, previously approved by the state board of education, and employing a superintendent devoting his full time to supervisory and administrative work, may employ and enter into contract with a superintendent of schools for the school district for a period of not to exceed three years. The superintendent of schools so employed in the district shall have had not less than five years' experience as the chief administrative officer of a school system working under the direction of a board of education and having administrative charge of all public schools within a six-director district, in which one-half or more of his time was devoted to administrative or supervisory duties, or shall have been employed as a teacher in the immediate high school district for a period of two years or more. The school board of such high school districts may enter into contracts, for a period not to exceed two years, with school teachers if the contracts are made upon the recommendation of the superintendent of schools of the high school district, but the contracts thus approved by the superintendent of schools shall not extend for a period of more than one year beyond the time for which the superintendent was employed to supervise the public schools of the high school district. This law shall not invalidate or repeal any other law of this state relating to the employment of teachers, principals or superintendents of public schools." (Emphasis added)

Honorable Harlan A. Gould

Thus, the authority of school boards within St. Louis County to provide by contract for a leave of absence is limited by this section which limits the term of employment contracts for superintendents to a period "not to exceed three years" and for teachers to a period "not to exceed two years."

It can be readily seen that the two and three year limitation renders impossible a sabbatical leave in the sense of a seventh year leave. Furthermore, this limitation on the contract period practically eliminates a one-year leave. For the board to pay a teacher for two years in exchange for services rendered only during one year would be per se a gift and in violation of the Constitution.

We believe that it is legally possible for a board to agree to a leave of absence for a short period during a two or three year contract. Whether or not this would be practicable is an administrative and not a legal question.

In summary, we are of the opinion that public school boards may grant leaves of absence with pay to teachers for the purpose of study and professional improvement. The agreement to grant leaves must be incorporated in the written terms of the employment contract and must be in exchange for services actually rendered during the contract period and not a gratuity.

Whether or not the teacher has been employed for a specified number of years or has agreed to return after the leave does not affect our conclusion. However, the leave cannot be in consideration of past services. At the choice of the parties, the contract may contain an agreement to return after leave. The board may also agree to accept the teacher after completion of leave. But, in St. Louis County, such an agreement would be limited to the period of the contract under Section 168.191. The board cannot make any contractual promise in excess of Section 168.191.

You further inquire as to the proper computation and payment of teachers retirement contributions where the teacher is granted leave. Section 169.010(16), RSMo Supp. 1967, defines a teacher as:

" * * * a teacher * * * who shall teach or be employed by any public school, * * * on a full-time basis and who shall be duly certificated under the law governing the certification of teachers * * * ."

Honorable Harlan A. Gould

Section 169.030, RSMo Supp. 1967, authorizes school boards to deduct from teachers salaries a certain per cent which deduction plus the contribution by the school district must be transmitted to the Board of Trustees of the Retirement System.

We have held that leaves of absence with pay are authorized only in exchange for services rendered. We are of the opinion that teachers retirement contributions should be calculated during the teacher's leave of absence in the same manner as contributions are calculated during periods of actual service. We find nothing in the Teachers' Retirement System Statutes which require different handling.

You next ask the effect leave of absence with pay would have upon the amount of state aid received by the district.

Section 163.011(3), RSMo Supp. 1967, defines teacher as follows:

"'Teacher' means any teacher, supervisor, principal or superintendent regularly employed for grades kindergarten through twelve more than one-half time in the public schools and who is certified under the laws governing the certification of teachers in Missouri."

The only state aid based upon teachers is the teacher preparation allowance authorized by subsection 2 of Section 163.031, RSMo Supp. 1967. That subsection reads as follows:

"2. A teacher preparation allowance shall be made to each district based on the education and preparation of the teachers employed by the district in grades one through twelve. The preparation of the teacher shall be based on semester hour credits earned at an accredited college or university and shall be paid as follows:

For each teacher with 150 or more semester hour credits-----\$492.00

For each teacher with 120 or 149 semester hour credits-----\$320.00

The teacher preparation allowance shall be granted to a district for each qualifying teacher regularly employed for more than one-half time in grades one through twelve. A school district shall spend for teachers' salaries each year at least eighty per cent

Honorable Harlan A. Gould

of the state school funds received under this section that year as provided by section 163.061 and not less than eighty per cent of the funds received under section 163.033 and as much of the revenue produced by local tax levies as was spent for teachers' salaries the previous year. In the event a district fails to comply with this provision, the amount by which the district fails to spend funds as provided herein shall be deducted from the district's apportionment for the following year provided that the state board of education may exempt a school district from this provision if the state board of education determines that circumstances warrant such exemption."

We are of the opinion that a teacher employed on a regular full-time basis who is granted a temporary leave with pay is a teacher within the definition of Section 163.011 and that the district would be entitled to the teacher preparation allowance authorized by Section 163.031 without reduction for the period during which the teacher is on temporary leave.

CONCLUSION

It is the official opinion of this office that:

1. The power of a public school board to employ teachers includes the discretion to grant temporary leaves of absence with or without pay subject to the limitations of other applicable laws.

2. Leave of absence must be set out in writing and incorporated in the employment contract between the board and the teacher. The leave cannot be a gratuity, but must be in exchange for service rendered by the teacher during the contract period.

3. Leave agreements by school boards of St. Louis County must be in accord with requirements of Section 168.191, RSMo Supp. 1967, which limits the terms of teaching contracts.

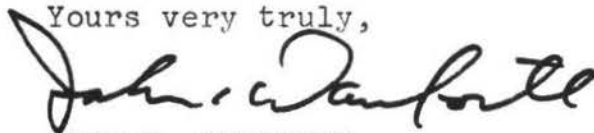
4. Public school teachers' retirement system contributions under Section 169.010, et seq., RSMo, should be calculated during the teacher's leave of absence in the same manner as contributions are calculated during periods of actual service.

Honorable Harlan A. Gould

5. A temporary leave of absence of a teacher employed on a regular full-time basis does not affect the eligibility of the school district for state aid known as "Teacher Preparation Allowance" under subsection 2 of Section 163.031, RSMo Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Louis C. DeFeo, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Encs. Op. No. 71, Pinnell, 5-7-51
Op. No. 41, Holman, 8-20-56
Op. No. 21, Dawson, 5-10-39
Op. No. 16, Chamier, 4-23-38

MS

PROBATE JUDGES:
MAGISTRATES:
DISABILITY:
VACANCY:
APPOINTMENT OR
TRANSFER OF JUDGES:
SALARY:

Section 482.120, RSMo, relating to the appointment of a judge of the magistrate court by the judge of the circuit court, and Section 481.180 relating to the appointment of a special probate judge by the Governor, are in conflict with Supreme Court Rule 11.05, which provides that the Supreme Court of Missouri make transfers to the probate and magistrate

courts, and are null and void. A de facto judge appointed under either such section is not entitled to the compensation provided for the office. The de jure judge holding said office is entitled to the emoluments of the office.

OPINION NO. 251
36 (1969)

FILED
36

January 30, 1969

FOR OPINION

Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your request for an opinion from this office, which you posed as follows:

"1. When the duly elected Probate Judge is incapacitated does the person appointed Special Judge to hold Magistrate Court also act in the capacity of Judge of the Probate Court?

"2. Would the individual appointed Special Judge to hold Magistrate Court be entitled to receive compensation from the State in the manner and amount as contained in the provisions of Section 482.120 RSMo., 1959?

"3. Should any amount paid by the State to the appointed Special Judge be deducted from the applicable monthly compensation provided for the duly elected, but incapacitated, official?

"4. Would the individual appointed as Special Judge of the Probate Court and Ex-Officio Magistrate be entitled to receive from the State, under the provisions of Section 481.180 RSMo., 1959, the amount of compensation provided for that of Magistrate in the applicable size county?

Honorable Haskell Holman -

"5. Would the duly elected and qualified, but incapacitated, official be entitled to receive from the State the amount of compensation as provided for the applicable size county during the period such official was incapacitated?"

You have advised us that in fact, an audit by your office disclosed that the regular judge, who had by affidavit voluntarily declared himself disabled and requested appointment of a "temporary judge" under the provisions of Section 481.180, RSMo 1959, was paid his salary to the conclusion of his term, as was the judge so appointed and actually serving. It is further our understanding that the disabled judge did not seek re-election and that the "temporary" judge was later elected judge at the regular general election.

These judges were in a county (Moniteau) of between ten and fifteen thousand inhabitants with an assessed valuation of over eleven and less than thirty million dollars; in such county the probate judge is ex-officio magistrate and compensation for one is compensation for the other (Section 482.150, RSMo Supp. 1967 and Article V, Section 18, of the Constitution of Missouri).

On July 13, 1966, a Moniteau County attorney was appointed "special" magistrate judge by the circuit judge of Moniteau County, pursuant to provisions of Section 482.120, RSMo. On July 25, 1966, the Governor appointed the same attorney temporary probate and ex-officio magistrate, pursuant to Section 481.180, RSMo.

Section 481.180, RSMo, reads as follows:

"Judge incapacitated, appointment of special judge--compensation--tenure.-- Whenever the judge of probate, from any cause, shall be unable to hold any term of court, or shall be unable to discharge his duties from continued sickness or mental or physical inability, the Governor, upon the certificate of such judge, or upon satisfactory proof of such fact, shall have power to appoint some suitable person, a resident of the county possessing the qualifications of a probate judge, to discharge the duties of said office, and to hold probate court in said county, during the existence of such inability of the regular judge; and the judge so appointed, during the period he shall act, shall possess the same powers, take and subscribe to the same oath and be liable to the same responsibilities, as the regular judge of said court, and receive the same compensation during such time; provided, that after

the appointment of such special judge, he shall continue to act as such until the Governor shall be satisfied by competent evidence that the regular judge is competent in all respects to act as judge, and until the Governor is thus satisfied, the regular judge shall have no power to act." (Emphasis added)

Section 482.120, RSMo, states:

"Disability or absence of judge--appointment of another, by whom.--If the judge of the magistrate court in any county which has only one magistrate court is incapacitated and unable to act or to dispose of the business pending before him for any reason, or is absent from the county, for a period of five days or more, the judge of the circuit court of such county may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the county to act as judge of the magistrate court of such county until such magistrate resumes his duties, and such magistrate or special judge, when so appointed shall possess all the powers and shall be subject to all the responsibilities of the regular judge of the magistrate court during the time of his appointment. Any person so appointed shall, before acting as judge of the magistrate court, take the oath required of magistrates. Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge which shall be paid by the state and charged against the salary of the regular judge of the magistrate court of such county. Any attorney appointed to act as magistrate shall be entitled to one-thirtieth of the monthly salary of the regular judge of the magistrate court of the county for each day he shall act as magistrate to be paid by the state and charged against the salary of the regular magistrate. Such payments shall be made upon the certification of the circuit judge and the clerk of such magistrate court that the person or magistrate was duly appointed and acted as magistrate of such court." (Emphasis added)

Honorable Haskell Holman -

In Opinion No. 85 dated January 18, 1955, to the Honorable John W. Stegner, enclosed, this office ruled that Section 482.120 was rendered null and void because of a conflict between that section and Article V, Section 6 of the Missouri Constitution, and Supreme Court Rule 11.05 pursuant thereto.

Article V, Section 6, provides:

"The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto."

Supreme Court Rule 11.05 states:

"Under Section 6 of Article 5 of the Constitution, the Supreme Court may temporarily transfer to the probate court or magistrate court of any county either a circuit judge, a probate judge, a judge of a magistrate court or a probate judge who is also judge of the magistrate court of his county. When any judge is so transferred he shall have the same powers and responsibilities as judge of the court to which he is transferred and may hold court at the same time either with or separately from the regular judge or judges of said court."

We remain of the opinion that Section 482.120 is null and void because of the conflict with the Constitution, and with Supreme Court Rule 11.05. The appointment of a "special judge" of the magistrate court by the circuit court was not authorized by law.

The further question is whether the same reasoning applies to appointment of a "special" probate judge by the Governor under Section 481.180. From a review of applicable law, we conclude that it does and that Section 481.180 is also in conflict with Article V, Section 6, of the Constitution and Supreme Court Rule 11.05.

Your last two questions inquire as to whether or not the "special judge" is entitled to the emoluments of the office and whether the de jure judge is entitled to any compensation.

We conclude that since the "special judge" was not lawfully appointed he is not entitled to any compensation.

The regular judge, however, is a de jure officer and is entitled to the emoluments of the office. Davenport v. Teeters, 315 S.W.2d 641 (1958).

Honorable Haskell Holman -

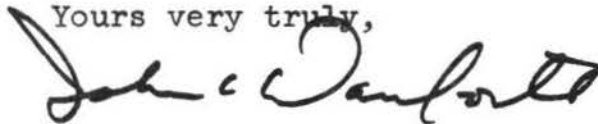
CONCLUSION

It is the opinion of this office that Section 482.120, RSMo, relating to the appointment of a judge of the magistrate court by the judge of the circuit court and Section 481.180 relating to the appointment of a special probate judge by the Governor, are in conflict with Supreme Court Rule 11.05, which provides that the Supreme Court of Missouri make transfers to the probate and magistrate courts, and are null and void.

A de facto judge appointed under either such section is not entitled to the compensation provided for the office. The de jure judge holding said office is entitled to the emoluments of the office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

enc: Opinion No. 85, Stegner, 1/18/55

PUBLIC RECORDS:
RECORDER'S OFFICE:
UNIFORM COMMERCIAL CODE:

Financing statements filed in recorder's
office subject to public inspection.

OPINION NO. 38

January 7, 1969



Honorable Robert Devoy
State Representative - District 92
Missouri House of Representatives
111 East Brooks Street
Brookfield, Missouri 64628

Dear Representative Devoy:

In your recent opinion request to this office you pointed out the existence of the "Public Records Act," (Section 109.180 and Section 109.190, RSMo Supp. 1967), and Section 400.9-407, RSMo Supp. 1967, a provision in the Missouri Uniform Commercial Code. You further stated, in part, as follows:

" * * * The question is, whether financing statements in the Recorder's office may be inspected by the public and persons in the abstract of title business without written request and without the payment of fees prescribed by 400.9-407.

"A further question is, should these records be considered private records of the Recorder or should they be considered public records open to the public for inspection under terms of Section 109.180?"

Section 400.9-401 provides for a financing statement to be filed or recorded either with the county recorder or with the Secretary of State depending upon the type of collateral that is used as security.

The question presented is whether such a financing statement as filed is open to public inspection as a public record kept in a public office.

The right of the public to inspect public records in this state is provided by Section 109.180, RSMo Supp. 1967, which provides in part:

Honorable Robert Devoy

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. * * *"

We find no statutory provision requiring financing statements to be exempted or excluded from the provisions of the above statutes.

Section 400.9-403, RSMo Supp. 1967, defines what constitutes a filing of a financing statement and the duties of the filing officer and provides in part:

"(4) A filing officer shall mark each statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement."

This statute expressly provides that it is the duty of the filing officer to mark the financing statement with a number, index, file the same and "shall hold the statement for public inspection."

It is the opinion of this department that a financing statement filed as provided for under Section 400.9-401 must be made available by the filing officer for public inspection without charge and that any person has the right to inspect and make copies of such statement within the hours and under such conditions as may be established by the filing officer that are reasonable.

Reference is made in the opinion request to Section 400.9-407, RSMo Supp. 1967, which provides that on the request of any person the filing officer shall issue a certificate showing whether there is on file a financing statement and other information in regard to the financing statement for which the file officer is entitled to a fee as provided in said statute. This section applies only when a person requests such information to be certified in writing by the filing officer and has nothing to do with the right of the public to inspect a financing statement.

Honorable Robert Devoy

CONCLUSION

It is the opinion of this department that a financing statement filed as provided for under the "Uniform Commercial Code" under Section 400.9-401, RSMo Supp. 1967, is subject to inspection free of charge by any person within the hours and under such conditions as may be reasonably imposed by the filing officer in charge of such financing statement.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,


NORMAN C. ANDERSON
Attorney General

MS

FILED
41

January 8, 1969

OPINION NO. 41
OPINION NO. 293 (1968)
Answered by letter-Bach

Honorable W. E. Sears, Director
State Board of Training Schools
P. O. Box 447
Jefferson City, Missouri 65101

Dear Mr. Sears:

This office is in receipt of your opinion request which desired the following questions to be answered:

"The inquiry for clarification is as follows:
Is it within the power of the Board of Training Schools to adopt reasonable rules or regulations concerning labor union activities on Training School grounds (Training School for Girls and Training School for Boys)? Within the responsibility of the Board to administer the Training Schools, is the attached Departmental policy reasonable? If so, what steps are available for enforcement of the policy should it be disregarded by any unauthorized persons entering the premises contrary to the established rule or regulation?"

In general, an administrative agency has the power to make any reasonable rule or regulation, which it is expressly authorized to make by statute or which is authorized by necessary and reasonable implication of the statute.

This general rule is stated at 1 Am. Jur. 2d, Administrative Law, §97, p. 894:

"The power of administrative agencies to make rules and regulations does not depend for its existence solely upon express grant. The authority of an administrative agency to adopt

Honorable W. E. Sears, Director

reasonable rules and regulations, which are deemed necessary to the due and efficient exercise of the powers expressly granted, cannot be questioned. This authority is implied from the power granted."

Sections 105.500 to 105.530, RSMo Supp. 1967, provide that employees of public bodies with certain exception, have the right to form and join labor organizations and present proposals relative to salaries and other conditions of employment through representatives of their own choosing.

It is clear that the Board of Training Schools does have authority to promulgate reasonable rules and regulations relating to the procedure to be followed by unions in presenting proposals as provided by law because such is necessary to the due and efficient exercise of the statutory power granted to the Board of Training Schools.

The Missouri legislature has granted the State Board of Training Schools broad powers and duties. Section 219.020, RSMo, provides that the State Board of Training Schools " * * * shall provide for the reception, classification, care, activities, correction, education and rehabilitation of all juveniles committed by law to its charge or to any institution under its control."

It is our view that the rules and regulations concerning labor union activities on Training School grounds promulgated February 2, 1967 by the Board of Training Schools are valid and within the Board's authority.

Any employees of the State Training Schools violating these rules and regulations are, of course, subject to disciplinary action as if they had violated any other Board rule or regulation. Furthermore, non-employees violating these rules and regulations are subject to legal sanctions, e.g., one entering the premises of the State Training Schools, without authority and in violation of the above rules, could be prosecuted for trespassing.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

LIBRARIES:

The Jefferson City Library Board is not authorized to pay lease rentals on buildings from the funds derived from a tax levy to erect public library buildings.

May 20, 1969

OPINION NO. 46

Honorable Thomas D. Graham
Representative
122 District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Graham:

This opinion is written to respond to your inquiries which you posed as follows:

"If the Jefferson City Library Board leases the site to (a) not-for-profit corporation and that corporation then builds the library building on the land and leases it back to the Library Board on an annual basis until the corporation has recouped its money and costs, at which time the corporation would transfer all interest to the Library Board, can the Library Board use funds realized from the levy under Section 182.260 'for the erection of free public library buildings in the city' to pay the rentals to the not-for-profit corporation necessary to permit that corporation to recoup its investments and costs?"

You state in your letter that the Jefferson City Library Board is receiving annual revenues from a two mill levy authorized by the electorate under Section 182.260, RSMo 1959, for the erection of free public library buildings. You further state that the Library Board has purchased a library site and employed an architect who has prepared preliminary plans, all from current revenues under the two mill levy.

For disposition of your inquiries we will consider initially the question of whether the money received from the two mill levy imposed under Section 182.260, RSMo 1959, (for the erection of city library buildings) can be used to pay lease rentals. Our answer is in the negative.

Honorable Thomas D. Graham

The courts have considered this problem and in Stephens v. Bragg City, (MA) 27 SW2d 1063, 1064, the court said:

"It is also said by plaintiff in error that since the city had used \$1,500 of this money to pay attorneys' fees in litigation to recover the money from a defaulting city treasurer, that manifested an intention to use this money for general purposes and that took away from it its character as a trust fund. With that contention we do not agree. This money did not belong to the general revenue fund of the city. It was the product of bonds voted by the people of the city to secure money for a specific purpose, and when the bonds were issued and sold the money received thereby could not legally be used by the city for any other purpose. The city authorities had no power under the law to transfer this money to the general revenue fund of the city and use it to pay ordinary debts of the city. Thompson v. City of St. Louis et al. (Mo. Sup.) 253 S.W. 969."

See also Thompson v. St. Louis et al, (Mo.) 253 S.W. 969, 972, error dis 46 Sct. 12, 269 US 589, 70 L ed 427.

This utilization of the funds in the manner you propose would constitute an unauthorized diversion inasmuch as the funds have the attributes of a trust and can be applied only for the purposes voted upon by the electorate.

Under the facts of this case, the ballot, as submitted to the voters, provided by its terms, that the levy of a two mill tax was "for the erection of free public library buildings in Jefferson City". The fund derived from this levy, by force of the above cited decisions had impressed upon its ultimate use by the Board the purpose of the erection of free public library buildings.

The payment from the funds created by this tax levy of lease rentals would not be within the ambit or purpose for which the tax levy was voted by the electorate.

Accordingly, we feel the utilization of the funds for the purpose and in the manner proposed, as set forth in your letter, would not be proper.

Inasmuch as we hold that funds derived from the tax levy "for the erection of the public library buildings" can not be utilized to pay rentals to the not-for-profit corporation, the issue of the library board's leasing the land to the not-for-profit corporation becomes moot under the facts. For this reason, we will not undertake to express an opinion on that point at this time.

Honorable Thomas D. Graham

CONCLUSION

It is the opinion of this office that the Jefferson City Library Board is not authorized to pay lease rentals on buildings from the funds derived from a tax levy to erect public library buildings.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

REAL ESTATE COMMISSION:
LICENSES:

(1) the Real Estate Commission cannot grant a license to a person whose license has been revoked under Section 339.110, RSMo 1959; (2) the Real Estate Commission can grant a license to a person whose license has been revoked under Section 339.100, RSMo 1959, if such person makes proper application and meets the qualifications of Section 339.040, RSMo 1959.

OPINION NO. 48

April 10, 1969

Mr. Marvin W. Camp
Executive Secretary
Missouri Real Estate
Commission
222 Monroe Street
Jefferson City, Missouri 65101



Dear Mr. Camp:

This is in answer to your request for an official opinion of this office concerning the question whether the Real Estate Commission can grant a real estate license to a person whose license has previously been revoked.

Section 339.040, RSMo 1959, which provides the qualifications for a real estate license, makes no mention that a person whose license has previously been revoked is not qualified for a license. Therefore, the answer to your question depends on the effect of a revocation provided for in both Section 339.100, RSMo 1959, and Section 339.110, RSMo 1959.

Section 339.110 provides as follows:

"When during the term of any license issued by the commission the licensee shall be convicted in a court of competent jurisdiction in the state of Missouri or any state, including federal courts, of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted. No

Mr. Marvin W. Camp

license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

It is our opinion that Section 339.110 explicitly prohibits the Commission from issuing a license to any person convicted of the listed offenses and, therefore, in answer to your question, the Commission cannot issue a license to any person whose license has previously been revoked for such offenses.

Section 339.100 empowers the Commission to suspend or revoke licenses for eleven listed causes. This section reads in part as follows:

"The commission may upon its own motion, and shall upon written complaint filed by any person, investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of: * * *"

We find no provision in Chapter 339 which discusses the effect of a suspension or revocation under Section 339.100.

The terms suspend and revoke are distinguishable. *Hanson v. State Board of Medical Examiners et al*, 220 Iowa 357, 260 N. W. 68, 70; *Martinka v. Hoffman*, 214 Minn. 346, 9 N.W.2d 13, 17; Webster's Third New International Dictionary. To suspend as directed by Section 339.100 is to cause to cease, temporarily or for a time prescribed, *Reynolds v. State Board of Equalization*, Cal.App., 162 P.2d 735, 739; Webster's Third New International Dictionary, where to revoke under the statute is to annul or terminate that which has been granted. *Reynolds v. State Board of Equalization*, 29 Cal.2d 137, 173 P.2d 551, 553; *Burns v. State*, Tex.Civ.App., 76 S.W.2d 172; Webster's Third New International Dictionary.

Unless there is a specific statutory prohibition as in Section 339.110, a new license can be granted upon proper application to a person who has previously had a license revoked. *Burns v. State*,

Mr. Marvin W. Camp

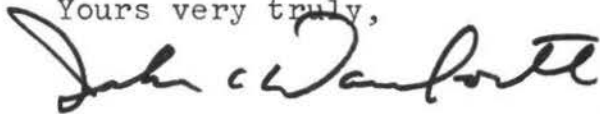
supra; State v. Otterholt, 234 Iowa 1286, 15 N.W.2d 529, 532; Hanson v. State Board of Medical Examiners, supra, 1.c. 260 N.W. 70. Accordingly, it is our opinion that the Commission can grant a real estate license to a person whose license has been revoked under Section 339.100 if such person makes proper application and meets the qualifications of Section 339.040.

CONCLUSION

It is the opinion of this office that: (1) the Real Estate Commission cannot grant a license to a person whose license has been revoked under Section 339.110, RSMo 1959; (2) the Real Estate Commission can grant a license to a person whose license has been revoked under Section 339.100, RSMo 1959, if such person makes proper application and meets the qualifications of Section 339.040, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

March 3, 1969

OPINION LETTER NO. 49

Honorable Harry Wiggins, Supervisor
State Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wiggins:

This is in response to your request for an opinion from this office as to whether a licensee with a set-up (C.O.L.) license can suggest or require that a patron deposit his liquor with the licensee, who provides a bar and storage area for this purpose and will then mix drinks as ordered by the patron for a certain price. Also, you have asked for our opinion as to when an establishment where food, beverages, or entertainment are provided for compensation but which does not possess a set-up license can allow consumption of intoxicating liquor on the premises between the hours of 1:30 a.m. Sunday and 6:00 a.m. Monday.

As to your first question, it is our opinion that there is nothing wrong with the current practice of certain set-up licensees who store their patrons' bottles and then charge for mixing drinks. This does not violate any of the liquor laws of the State of Missouri as the licensee is not selling liquor but merely charging for his services in mixing the drink and providing the "set-up."

As to your second question, it is our opinion that an establishment where food, beverages or entertainment are sold or provided for compensation but which does not possess a set-up license can allow the consumption of intoxicating liquor on the premises between the hours of 6:00 a.m. and 10:00 p.m. on Sunday. We call your attention to paragraph 1, Section 311.480, RSMo 1959, which provides:

"1. It shall be unlawful for any person operating any premises where food, beverages or

Honorable Harry Wiggins

entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten P.M. and six A.M. the following day, without having a license as in this section provided."

This only prohibits consumption of intoxicating liquor on the premises between the hours of 10:00 p.m. to 6:00 a.m. daily, therefore, consumption between the hours of 6:00 a.m. to 10:00 p.m. daily is legal. See also Attorney General Opinion No. 21, issued to the Honorable Bill Davenport on April 11, 1952 (copy attached).

Therefore, it is our opinion that:

1. A licensee with a set-up (C.O.L.) license can request or require that its patrons deposit their liquor with the licensee, who will then mix drinks on demand and charge for his services.

2. An establishment where food, beverages or entertainment are sold or provided for compensation but which does not possess a liquor license can permit the consumption of intoxicating liquor on the premises between the hours of 6:00 a.m. to 10:00 p.m. on Sunday.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 21
4-11-52, Davenport

SCHOOLS:
TRUSTS:
CHARITY:

(1) The Board of Education of the Chillicothe R-2 School District is the "Chillicothe School Committee" as the term is used in the will of Florence Pendleton.

(2) A public school board may act as trustee of a charitable trust, the purpose of which is an authorized function of the school district.

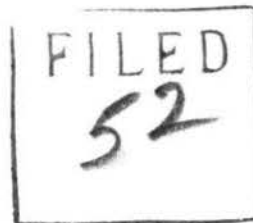
(3) A public school district by use of private trust funds may promote the continuing education of its residents through non-interest loans for higher education.

(4) Where a public school district is the trustee of a charitable trust, discriminatory limitations on the trust based on race, religion, national origin, or sex are void and unenforceable. However, such invalid provisions do not void a trust where the intent of the testator, as seen from the will itself, is to create a charitable trust in any event; but such trust is to be enforced without regard to the invalid provisions.

OPINION NO. 52

July 1, 1969

Honorable Ronald L. Somerville
State Senator, District 12
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Somerville:

This official opinion is issued in response to your request for a ruling of this office. Your inquiry relates to the following situation:

Florence Pendleton, a resident of the State of Maine, by will established a trust for the purpose of providing "non-interest loans [to attend college] to needy male graduates of the Chillicothe Public High School, Chillicothe, Missouri. Said loans are to be awarded only to 'white persons of the Protestant faith'." The person first named by testatrix as trustee apparently predeceased the testatrix. In this event, the will provided that the trustee be "The Chillicothe School Committee."

Your request presents the following questions:

Honorable Ronald L. Somerville

"1. Can the Board of Education of the Chillicothe R-2 School District qualify as the 'Chillicothe School Committee' under the will of the deceased?

"2. If so, does the Board of Education of the Chillicothe R-2 School District have the authority to administer the trust created by the will of the deceased?"

By a later letter you add the following question:

3. Do the discriminatory provisions in the will cause the entire trust to be void?

I.

With respect to the first question, i.e., whether or not the Chillicothe Board of Education qualifies as the "Chillicothe School Committee" under the terms of the will, it is our opinion that it does. Since the deceased was a resident of the State of Maine, the law of such state is applicable in determining whether or not the Chillicothe Board of Education qualifies as trustee under the terms of the trust. The general rule with respect to testamentary trusts is that the will itself, as properly construed, determines who the trustees are to be. See 96 C.J.S., Wills, Section 1025. In construing the will, the intention of the testator is crucial to any determination. With respect to the naming of beneficiaries, the Maine Supreme Court has announced:

"It is a familiar rule of interpretation that when the name or designation in the will does not designate with precision any person or corporation, but so many of the circumstances concur to indicate that a particular person or corporation was intended and no similar conclusive circumstances appear to distinguish any other beneficiary, the person or corporation thus shown to be intended will take.* * *"
State Trust Co. v. Pierce, 136 A. 289, 289 (Me. 1927).

In construing the intent of the testatrix, it is important to note that the entity which is called a District Board of Education in Missouri is known as a School Committee in Maine. Under the authority of 20 M.R.S.A., Sections 471, 472 and 473, the members of the Supervisory School Committee in Maine are given the authority to manage the schools, determine the courses, dismiss teachers, expel students, determine who is to attend schools and to carry out

Honorable Ronald L. Somerville

the duties generally carried out by school boards in the State of Missouri. See Chapter 165, RSMo. Under these circumstances, it is our view that the testatrix could not have intended any entity other than the Board of Education of the Chillicothe R-2 School District by the use of the term "Chillicothe School Committee" in her will.

II.

With respect to the second question, does the Chillicothe School Board have the authority to administer the trust created by the will of the deceased, it has been said that:

"Municipal corporations may hold property for charitable uses, and they may be compelled in equity to administer and execute the trusts reposed in them.* * *" Barkley v. Donnelly, 112 Mo. 561, 575 (1892) (Here City of Kansas City was trustee of charitable trust to build orphanage)

The City of St. Louis can be a trustee:

"* * *if the trusts, with which they are clothed and whose performance they voluntarily undertake, are not inconsistent with nor foreign to the purposes for which they were instituted, there is no reason why they should be restrained from becoming trustees.* * *" Chambers v. City of St. Louis, 29 Mo. 543, 578 (1860).

In the case of Ramsey v. City of Brookfield, 237 S.W.2d 143 (Mo. 1951), the Court upheld the power of the city to be a trustee for the purpose of building and maintaining a city hospital. The Court stated, l.c. 145:

"* * *A municipal corporation may act as trustee of a charitable trust the purpose of which is an authorized function of the municipality.* * *"

We are unable to find any case before the courts of this state or any other state which rules upon the question of whether or not a public school district of this state may be a trustee of a charitable trust. Section 177.011, RSMo Supp. 1967, and other statutes do authorize school districts of this state to hold title to property for school purposes. We are of the opinion that the rule stated in the Ramsey case, supra, is applicable to public school districts. See further: Bogert on Trusts and Trustees, Second Edition, Section 328, page 721; 15 Am. Jur. 2d, Charities, Section 48.

Honorable Ronald L. Somerville

Having concluded that the Chillicothe School Board has the authority to be the trustee of a charitable trust for purposes within its corporate powers, the question arises as to whether or not this trust is within the powers of a public school district.

The trust involved provides for non-interest loans for high school graduates for the purposes of college or university education. It is clear that the public school board does not have statutory authority to use state and local revenue for this purpose. The question remains, however, whether they may use private funds, such as this trust, for such a purpose.

In Opinion No. 100, Hearn, 1-18-66 (copy enclosed), we discussed at length the fundamental power of a public school district and expressed the opinion that the school district has the power to provide an education for all residents of the district without regard to age. This power is necessarily implied from the statutes creating the school districts. Therefore, based upon this Opinion, we are of the view that a school district may promote continued education of residents of the school district through the use of private trust funds. Whether or not the trust should be accepted is, of course, within the sound discretion of the school board.

It is the opinion of this office that the Chillicothe R-2 School District has the authority to administer the trust created by the will of Florence Pendleton.

III.

Your final inquiry relates to the discriminatory provisions of the will which restrict beneficiaries to white male students of the Protestant faith.

Assuming that the Chillicothe R-2 School District qualifies as trustee, the legal title and the responsibility for maintaining the trust will vest in an agency of the State of Missouri; i.e., a public school district. This being so, the matter is necessarily governed by the Fourteenth Amendment to the United States Constitution. Under the doctrine of equal protection, the discriminatory limitations of race and religion are void and unenforceable. See Commonwealth v. Pennsylvania et al v. Board of Directors of City Trusts of the City of Philadelphia, 353 U.S. 230 (1957).

Also, it is our opinion that the discriminatory limitation with respect to sex is void and unenforceable. The Fourteenth Amendment does not allow prejudicial disparities unless there is rational justification for discrimination. See Gruenwald v. Gardner, 390 F.2d 591, 592 (2nd Cir. 1968). In White v. Crook, 251 F. Supp.

Honorable Ronald L. Somerville

401 (M.D.Ala. 1966), a law which excluded women from jury duty was found to be unconstitutional in that it violated equal protection of the law under the Fourteenth Amendment. In Karczewski v. Baltimore and Ohio Railroad Company, 274 F. Supp. 1969 (N.D.Ill. 1967), a law which prohibited a woman from seeking damages for loss of consortium while permitting her husband to do so was found to be unconstitutional in that it violated the Equal Protection Clause of the Fourteenth Amendment. We find no rational justification for excluding members of the female sex from the provisions of this trust. The obtaining of a college education is important for everyone in this day and age and an otherwise properly qualified individual should not be denied the benefits of a trust of this nature because of her sex.

However, it is our view that these void and unenforceable discriminatory limitations do not effect the overall validity of this trust. Maine case law indicates that charitable trusts are to be construed liberally, Prime v. Harmon, 113 A. 738 (Me. 1921), and that valid provisions in a trust should be allowed to stand even though certain provisions must be invalidated, if such is within the intention of the testatory. True Real Estate Company v. True, 99 A. 627 (Me. 1917). This is in keeping with the general rule of construction in testamentary trusts, i.e., "* * *to adopt that construction which will effectuate a will as far as possible, upholding the valid while striking down the invalid, in order to carry out the intention of the testator, as long as the general scheme and purpose of the testatory is not defeated* * *" Brant v. Brant, 273 S.W.2d 734, 737 (St. L. Mo. App. 1954). Other jurisdictions, in considering this problem, have allowed testamentary trusts of this nature to be imposed minus the discriminatory provisions. See Commonwealth of Pennsylvania v. Brown, 392 F.2d 120, 25 A.L.R.3d 724 (3rd Cir. 1968), cert. denied, 391 U.S. 921 (1968) and the Annotation following, at 25 A.L.R.3d 736, Section 6.

It is our opinion that the testatrix in this instance, did not intend that the entire charitable trust be voided because of the invalidity of certain provisions. As proof of this, we quote three paragraphs from her will:

"It is my purpose and intent to exclude from the provisions of this will, any relatives or close friends which I may have, my intention being to further the educational opportunities of the above mentioned recipients.

"Notwithstanding any of the foregoing provisions the trustee, above named, or his successor shall have full discretion as to the choice of individuals receiving such loans, the amount of such loans, the time of granting of such loans and

Honorable Ronald L. Somerville

the worthiness of the institution in which a prospective recipient of a loan shall pursue his course of education.

"If at some future time the income and principal from the fund cannot be usefully applied to such loans, it may be used by the trustee for some other purpose which will qualify as a charitable deduction under the Internal Revenue Code as Amended, and which will permit appropriate recognition of the intent of the gift."

CONCLUSION

Therefore, we are of the opinion that:

(1) The Board of Education of the Chillicothe R-2 School District is the "Chillicothe School Committee" as the term is used in the will of Florence Pendleton.

(2) A public school board may act as trustee of a charitable trust, the purpose of which is an authorized function of the school district.

(3) A public school district by use of private trust funds may promote the continuing education of its residents through non-interest loans for higher education.

(4) Where a public school district is the trustee of a charitable trust, discriminatory limitations on the trust based on race, religion, national origin, or sex are void and unenforceable. However, such invalid provisions do not void a trust where the intent of the testator, as seen from the will itself, is to create a charitable trust in any event; but such trust is to be enforced without regard to the invalid provisions.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

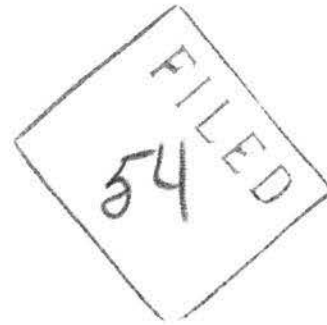
Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 100
1-18-66, Hearnese

February 28, 1969



Opinion No. 54
Answered by letter-Mansur

Honorable John H. Mittendorf
Assistant Prosecuting Attorney
Franklin County Court House
Union, Missouri 63084

Dear Mr. Mittendorf:

This is in response to your letter requesting an opinion from this office on whether a director who was duly elected and qualified as a director of a hospital district becomes disqualified by changing his residence from the hospital district from which he was originally elected.

We are enclosing herewith a copy of an opinion issued by this office on December 30, 1965, to Honorable William Pickle, Representative of Platte County, Missouri House of Representatives, in which it was ruled that when a director of a water district moves outside of the district from which he was elected or appointed with intent to permanently reside outside of the district he forfeits his office.

The residence requirements for a director of a water district under Section 247.040, RSMo., are similar to the requirements for a director of a hospital district under Section 206.090, RSMo., Supp. We believe the same principles of law which are discussed in the enclosed opinion regarding a director of a water district apply to a director of a hospital district and the same conclusion should be reached.

Honorable John H. Mittendorf

It is our opinion that when a duly elected director of a hospital district changes his residence from the hospital district with the intent to permanently reside outside the district he thereby forfeits his office as director of the hospital district.

Yours very truly,

JOHN C. DANFORTH
Attorney General

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CHIROPRACTIC:
RULES AND REGULATIONS:

That part of Rule 16.4(b) of the Personnel Advisory Board which provides that only physicians may verify certificates of sick leave for state employees is invalid, and to carry out the intention of the legislature the rule should also provide that a chiropractor is legally qualified to verify the certificate required for sick leave resulting from an illness he is legally authorized to treat.

OPINION NO. 55

March 13, 1969



Honorable Joe D. Holt
State Representative
District 102
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Holt:

This is in response to your request for an official opinion concerning the validity of that part of Rule 16.4(b) of the State Personnel Division and State Advisory Board which reads as follows:

"In all cases where an employee has been absent on sick leave he shall immediately upon return to work submit a statement that such absence was due to illness and, in cases where such absence exceeds five working days, such statement shall be verified by a written certificate executed by a physician."

You question the validity of this rule inasmuch as it precludes verification of the certificate by a chiropractor. A chiropractor is not a physician, Opinion Attorney General No. 148, Akers, 5-2-68, a copy of which is enclosed.

The legislature has recognized the status of both physicians and chiropractors. Section 334.010, RSMo, is as follows:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its department, or to profess to cure and attempt to treat the sick and other afflicted with bodily or mental infirmities, or engage in the practice of midwifery in this state, except as herein provided."

Honorable Joe D. Holt

The practice of chiropractic is defined in Section 331.010, RSMo, as follows:

"The practice of chiropractic is hereby defined to be the science and art of palpating and adjusting by hand the movable articulations of the human spinal column, for the correction of the cause of abnormalities and deformities of the body. It shall not include the use of operative surgery, obstetrics, osteopathy, nor the administration or prescribing of any drug or medicine. The practice of chiropractic is hereby declared not to be the practice of medicine and surgery or osteopathy within the meaning of chapter 337, RSMo, and not subject to the provisions of said chapter."

The manner in which the legislature regards chiropractic practitioners is stated in Section 331.040, RSMo, as follows:

"Chiropractic practitioners shall be subject to the state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of deaths, and all matters pertaining to public health, and such reports shall be accepted by the officer or department to whom such report is made."

The legislature, therefore, has recognized two distinct healing professions or procedures for the cure and treatment of illnesses. One deals with the administration of drugs and the performance of surgery, while the other is limited to the science and art of palpating and adjusting by hand the movable articulations of the spinal column. The statutes do not distinguish between chiropractors and physicians as to their competency with respect to matters falling within the purview of subjects with which the statutes require physicians and chiropractors to be informed.

In *Harder vs. Thrift Construction Company*, 53 S.W.2d 34, loc. cit. page 37, the St. Louis Court of Appeals stated:

"Appellants complain of the competency of the testimony of the chiropractor, but we see no merit to the point. His testimony went only to matters falling within the purview of subjects with which the statute (section 13549, R. S. 1929, Mo. St. Ann. § 13549) requires a chiropractor to be informed, and therefore he was a competent witness upon the matters covered by his testimony. * * *"

Honorable Joe D. Holt

The power of the Board to prescribe rules and regulations is not the power to make law, for no such power can be delegated by the legislature, but the power to carry into effect the will of the legislature as expressed in the statutes. A regulation which does not do this but operates to create a rule out of harmony with the statute is a mere nullity. In *Northern Natural Gas Company v. O'Malley*, 277 F.2d 128, the court stated:

"* * * A right clearly created by statute cannot be taken away by regulation. * * *"

The effect of the denial of certification by a chiropractor is that the person who is treated by a chiropractor could not be granted sick leave until he has consulted a physician. The annoyance and expense of such a consultation naturally would prevent many persons from employing a doctor of chiropractic even if they prefer that method of treatment.

It is true that chiropractors cannot administer drugs or perform surgery with the use of instruments. Assuming that they cannot administer antitoxin, for example, in the treatment of diphtheria or amputate an arm hopelessly crushed, such patients as they do treat by permitted methods should not be denied their sick leave without undue annoyance and expense when the practitioner is competent to treat the illness in question.

Clearly, a licensed chiropractor who practices with the sanction of law practices "for the correction of the cause of abnormalities and deformities of the body" within the meaning of Section 331.010. A patient who employs a person licensed to practice should not be subjected to the additional annoyance and expense of employing a physician when the law does not require it.

The Board cannot, by regulation, alter or amend the law. All it can do is to regulate the mode of proceeding to carry into effect what the legislature has enacted. The statutes clearly include both physicians and chiropractors as members of the healing arts. The regulation seeks to confine the operation of the statutes to physicians only. This is manifestly an attempt to put into the body of the statute a limitation which the legislature did not think it necessary to prescribe. Therefore, the Personnel Board is acting arbitrarily, beyond the scope of its authority, in distinguishing between the healing professions recognized by the legislature and is in effect prescribing the kind of health care permissible for state employees.

The justification for Rule 16.4(b) is to screen out malingerers, not to put the Personnel Board in the business of making qualitative distinctions between types of healing arts. In order that the rule may carry into effect the will of the legislature as expressed in the statutes, the rule must be expanded to permit a chiropractor

Honorable Joe D. Holt

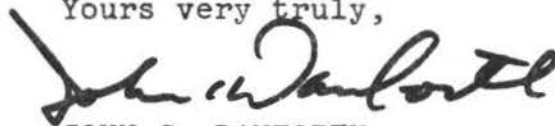
to verify the required certificate when the absence was due to an illness for which the legislature has authorized treatment by a licensed chiropractor.

CONCLUSION

It is the opinion of this office that that part of Rule 16.4 (b) of the Personnel Advisory Board which provides that only physicians may verify certificates of sick leave for state employees is invalid, and to carry out the intention of the legislature the rule should also provide that a chiropractor is legally qualified to verify the certificate required for sick leave resulting from an illness he is legally authorized to treat.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 148
5-2-68, Akers

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OPINION NO. 56
Answered by Letter - Nowotny

February 3, 1969



Honorable Hunter Phillips
Chairman of State Tax Commission
State of Missouri
Jefferson City, Missouri 65101

Dear Chairman Phillips:

This is in answer to your request for an opinion of this office as to whether the Board of Equalization of a first class county can remove from the assessment list property which has been placed on the list by the assessor if the Board finds that the property is not subject to taxation.

Section 138.100, RSMo 1959 provides for the functions of the Board of Equalization of first class counties, and subsection 2 reads in part as follows:

" * * * Provided further that said board of equalization shall meet thereafter at least once a month for the purpose of hearing allegations of erroneous assessments, double assessments and clerical errors, and upon satisfactory proof thereof shall correct such errors and certify the same to the county clerk and county collector."

The question is whether the term "erroneous assessments" refers to the assessment of exempt property. If so, then Section 138.100, supra, clearly allows the Board the right to determine tax exempt property.

Enclosed is a copy of Attorney General Opinion No. 76, dated April 29, 1959, issued to the Honorable Marion Robertson, dealing with the same question in relation to county courts. The opinion turned there, as here, upon the definition of the same term "erroneous assessments" as used in Section 137.270, RSMo. The opinion held that the term "erroneous assessments" included the assessment of tax exempt property and accordingly that a county court could remove any tax exempt property from the rolls.

Honorable Hunter Phillips

We hold that the definition in Opinion No. 76 applies here and therefore the Board of Equalization of a first class county can remove from the assessment list property that the Board finds is exempt from taxation.

Very truly yours,

Encls: Op. No. 76.

JOHN C. DANFORTH
ATTORNEY GENERAL

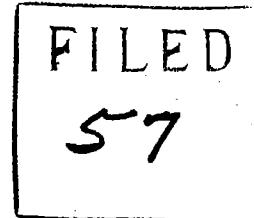
CONSERVATION COMMISSION:
FISH AND GAME:
LICENSES:

The Missouri Conservation Commission has the authority to regulate the method and manner of taking predatory animals and that Rule IV, Section 4.10 of the Wildlife Code of Missouri, 1969, is a lawful exercise of that authority.

November 6, 1969

OPINION NO. 57

Honorable A. F. Turner
Prosecuting Attorney
Wright County
Mountain Grove National Bank Building
Post Office Box 110
Mountain Grove, Missouri 65711



Dear Mr. Turner:

On July 30, 1968, this office received an opinion request from you as follows:

"We have had several requests from coyote and wolf hunters as to their coming under the law with regard to weapons. They wonder if they have to like other hunters do, since they are hunting predators, they wonder if they cannot have their guns loaded.

"We would appreciate you letting us know if you feel under the applicable laws and regulations of the Conservation Commission that it is necessary that these weapons be plugged."

On September 24, 1953, this office issued an opinion which stated in part the following conclusion:

". . . it is, . . . the opinion of this office that Rule 14 of the Wildlife Code in assuming to limit the means whereby predators of game wildlife in this State may be killed is in excess of the authority of the Commission under said Section 40 (a) and is, therefore,

Honorable A. F. Turner

null and void, and that under Chapter 279 of the Revised Statutes of Mo., 1949, relating to bounties on wolves such species of unprotected wildlife may be taken by any means desired, including the use of poisonous gas, and the County Courts of the several counties of this State are required to pay bounties on wolves and wildcats killed by means of poisonous gas."

This opinion, in effect, concluded the Conservation Commission had no power to regulate the method of killing predators. Under this authority, the answer to your request would be that persons hunting predators do not have to plug their weapon. This office has, however, concluded that Opinion No. 99 issued on September 24, 1953, should be and is hereby withdrawn.

Article IV, §40(a) of the Missouri Constitution provides in part as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission"

Section 252.020, RSMo 1959, defines subjects relating to the Conservation Commission authority over "wildlife". Subsection 3 of 252.020, RSMo reads as follows:

"The words 'wild life' shall mean and include all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive; and shall extend to and include any and every part of any individual species of wild life."

The Constitution of Missouri places the "control" of all "wildlife resources of the state" in the hands of the Conservation Commission and the legislature has defined "wild life" to include all "wild animals, regardless of classification, . . . protected or unprotected, dead or alive" including "any and every part of any individual species of wild life". It is our opinion that this definition includes

Honorable A. F. Turner

predators and thus gives the Conservation Commission the authority to regulate the taking of predators.


Rule IV, Section 4.10 of the Wildlife Code of Missouri, 1969, defines the firearms limitations when the firearm is being used for hunting certain wildlife. It is the opinion of this office that persons hunting predators are bound to comply with this section.

CONCLUSION

It is the opinion of this office that the Missouri Conservation Commission has the authority to regulate the method and manner of taking predatory animals and that Rule IV, Section 4.10 of the Wildlife Code of Missouri, 1969, is a lawful exercise of that authority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Alfred C. Sikes.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COUNTIES:
LEVEE DISTRICTS:
DRAINAGE DISTRICTS:
ROADS:

ms
County liable for benefits to public
roads in drainage or levee districts.

OPINION NO. 59

January 21, 1969



Honorable Max B. Benne
Prosecuting Attorney
Holt County
Court House
Oregon, Missouri 64473

Dear Mr. Benne:

This is in response to your opinion request as follows:

"I have been requested by the County Court of Holt County as to whether or not they would be liable to pay to a levee district and to a drainage district both of which were organized by the Circuit Court of Holt County, for benefits assessed against the County for the county roads. There seems to be little if any question as to the fact that the county does receive considerable benefits from the levees and the ditches which have been established by these districts.

"Under Article 10, Section 6, of the Missouri Constitution, and the annotations therein cited in Volume Two, V. A. M. S. 492--494 it would appear that the Legislature could require the county to pay benefits but I am unable to find any Statute by which these are directed or authorized to do so."

Holt County has county organization as distinguished from counties with township organization. The question presented deals with a levee district and a drainage district organized by the Circuit Court. Chapter 242, RSMo, governs the organization of drainage districts organized by the Circuit Court, and Chapter 245, RSMo, governs levee districts organized by the Circuit Court.

In regard to drainage districts, Section 242.260, RSMo, provides that after commissioners have been appointed by the Circuit

Honorable Max B. Benne

Court to assess benefits and damages that will result in constructing drainage districts that said commission,

" 'shall assess the amount of benefits, and the amount of damages if any, that will accrue to * * * public highways, railroad and other rights of way, railroad roadways and other property from carrying out and putting into effect "the plan for reclamation" heretofore adopted. * * * The public highways, railroad and other rights of way, roadways, railroad and other property shall be assessed according to the increased physical efficiency and decreased maintenance cost of roadways by reason of the protection to be derived from the proposed words and improvements.' (Italics ours.)"

In Platte River Drainage Dist. No. 1 v. Andrew County, 278 S.W. 387, the Supreme Court of Missouri held that in drainage districts organized by the Circuit Court in the county having county organization, the benefits assessed to public roads in a drainage district is a liability of the county and payable out of its general revenue.

This statute was last considered by the court in Fort Osage Drainage District v. Jackson County, 275 S.W.2d 326, Fort Osage Drainage District sued Jackson County for benefits assessed by the drainage district for the maintenance tax levied for benefits to the public roads within the district. In discussing this question, the court stated, l.c. 329:

"[6] Plaintiff District had the statutory power to levy the tax in question through District's board of supervisors. Section 242.490 RSMo 1949, V.A.M.S. Actions may be brought, on delinquent district tax bills within six months after delinquency, by a district in its corporate name and a judgment rendered for the delinquent taxes and penalty, including costs, and a reasonable attorney's fee to be fixed by the court. Section 242.600 RSMo 1949, V.A.M.S. Section 242.590 RSMo 1949, V.A.M.S., and Section 242.600, supra, provide that upon certification filed in the office of the recorder of deeds, the drainage tax shall constitute a lien. Although such a lien is unenforceable as against public highways, yet a drainage district may resort to an appropriate common-law remedy to recover the tax, penalty, and costs including an attorney's fee, usually an action seeking a general judgment, against the political or governmental subdivision of

Honorable Max B. Benne

the State chargeable with the maintenance of the public roads and highways--in the instant case, defendant County. Platte River Drainage Dist. No. 1 of Buchanan County v. Andrew County, Mo.Sup., 278 S.W. 387; Harrison and Mercer County Drainage Dist. v. Trail Creek Tp., 317 Mo. 933, 297 S.W. 1. See also Drainage Dist. No. 1 of Bates County v. Bates County, 269 Mo. 78, 189 S.W. 1176; Id., Mo., 216 S.W. 949, treating with the County Court Drainage Law, now Section 243.010 et seq. RSMo 1949, V.A.M.S."

It is the opinion of this department that Holt County is liable for benefits to public roads within a drainage district that are properly assessed resulting from the construction or maintenance of a drainage district organized under Chapter 242, RSMo.

In regard to levee districts organized by the Circuit Court in counties having county organization, Section 245.120, RSMo, provides in part that the commissioners appointed by the Circuit Court shall assess benefits and damages resulting from the construction of a levee and,

"1. * * * they shall assess the amount of benefits, and the amount of damages, if any, that will accrue to each governmental lot, forty acre tract or other subdivision of land according to ownership, railroad and other right of ways, railroad roadways and other property from carrying out and putting into effect the plan for reclamation heretofore adopted. The commissioners in assessing the benefits to lands, public highways, railroad and other right of ways, railroad roadways and other property not traversed by such works and improvements as provided for in the plan for reclamation, shall not consider what benefits will be derived by such property after other levees, ditches, improvements or other plans for reclamation shall have been constructed, but they shall assess only such benefits as will be derived from the construction of the works and improvements set out in the plan for reclamation, or as the same may afford protection from overflow of such property. * * *"

The provisions of this statute are substantially the same as Section 242.260, supra, regarding drainage districts and should receive the same interpretation.

Honorable Max B. Benne

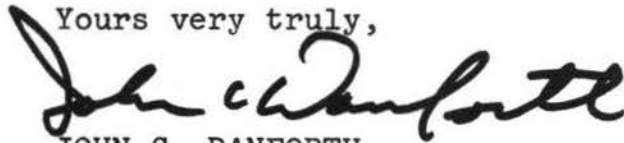
It is the opinion of this department that Holt County is liable for benefits assessed by a levee district organized by the Circuit Court against public roads situate within the district resulting from the construction of levees by a levee district.

CONCLUSION

It is the opinion of this department that a county not under township organization is liable for benefits assessed against county public roads in a levee district or drainage district organized by the Circuit Court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

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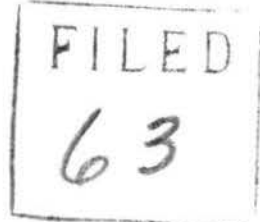
JOHN C. DANFORTH
Attorney General

CITIES, TOWNS AND VILLAGES:
ANNEXATION:

Votes in each area counted separately.

OPINION NO. 63

February 11, 1969



Honorable E. J. Cantrell
State Representative - 33rd District
Missouri House of Representatives
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Cantrell:

You requested an official opinion from this office as follows:

"In April 1967 the City of Overland sought to annex a territory generally described as Ashby, Page, Lindbergh and South Island tracks. The residents of this area defeated the proposition.

"The City of Overland is now considering extending its boundaries to include this same area, plus the area known as Elmwood Park. Now those two areas are not contiguous.

"Here is the query on which I would like for you to make an opinion: 'If two non-contiguous areas are presented in April 1969, may the combined votes in both areas be considered so that, if the voters in one area were opposed to the extension, and a sufficient number in the other area were in favor of the extension, so that their combined votes would be favorable, would Overland then be entitled to annex both territories?'"

It appears from the facts as submitted that the City of Overland attempted to annex an area in April 1967 which annexation was defeated by a majority of the residents of said area. The city is now considering submitting a proposition in April 1969 to annex this same area together with another area which is not contiguous to the first area. You inquire whether the votes in each area

Honorable E. J. Cantrell

must be considered separately or whether the votes in both areas to be annexed may be combined in determining whether each area is to be annexed.

Overland is a fourth class city located in St. Louis County which is a first class chartered county.

Section 71.870, RSMo Supp. 1967, provides:

"The legislative body of any city, town or village located within the boundaries of a first class chartered county shall not have the power to extend the limits of such city, town or village by annexation of unincorporated territory adjacent to the city, town or village in accordance with the provisions of law relating to annexation by such municipalities until an election is held at which the proposition for annexation is carried by a majority of the total votes cast in the city, town or village and by separate majority of the total votes cast in the unincorporated territory sought to be annexed. There shall be separate elections submitting the proposition of annexation to the two groups of voters, the same to be held simultaneously. The elections shall be held, except as herein otherwise provided, in accordance with the general state law governing elections in first class counties."

The primary rule of construction of the statutes is to ascertain and give affect as to the intent of the legislature. *Kasten v. Guth*, Mo., 375 S.W.2d 110.

This statute expressly provides that when a city located within the boundaries of a first class chartered county desires to extend its boundaries, the proposition for extending the boundaries of said city, must be submitted to a vote of the inhabitants of the municipality and of the territory to be annexed with separate elections to be held simultaneously, and a majority of the votes in the municipality and separate majority of the votes cast in the territory to be annexed must approve the annexation before the territory is annexed.

It is our view that under this statute the votes cast by the residents of each area or territory to be annexed must be considered separately in determining whether such area or territory is to be annexed, and if a majority of the votes cast in the election in an area or territory is opposed to annexation, such area or territory cannot be considered annexed. We believe the legislature intended, under this statute, for the residents of each

Honorable E. J. Cantrell

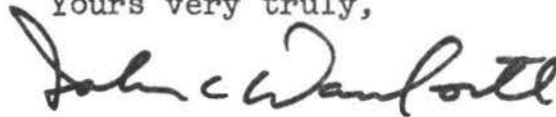
territory to decide by their vote whether such territory or area is to be annexed.

CONCLUSION

It is the opinion of this department that if a municipality located within the boundaries of a first class chartered county wishes to extend its limits by annexation, the proposition for annexation must be submitted to a vote of the people of the municipality and of the territory to be annexed, and if more than one non-contiguous territory or area is to vote on the question of annexation at the same time, the votes in each territory must be considered separately in determining whether each territory or area is to be annexed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

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WATER SUPPLY DISTRICTS:
VACANCIES:

The three remaining members of the Board of Directors of the St. Louis County Water Supply District No. 2 should call a special election to fill the vacancies caused by the resignation of two members more than six months prior to the expiration of their terms.

OPINION NO. 65

January 30, 1969



Honorable John J. Johnson
State Senator - 15th District
Missouri Senate
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Johnson:

This is in response to your request for an opinion as to whether the three remaining members of the Board of Directors of the St. Louis County Water Supply District No. 2 can fill the vacancies caused by the resignation of two directors more than six months prior to the expiration of their terms of office or whether they should call a special election to fill the vacancies.

Section 247.060, RSMo 1959, provides that:

" . . . Vacancies in offices of board members shall be filled for the unexpired term by the remaining members of the board; provided, should any vacancy occur more than six months prior to the expiration of the term in which no vacancy occurs, the board shall call a special election to fill the vacancy." (Emphasis added)

It is our feeling that the legislative intent with respect to the proviso is quite clear, i.e., a special election should be called to fill a vacancy which occurs more than six months prior to the expiration of the vacant term. The use of the word "no" in the proviso is a misprint, probably put in inadvertently by the draftsman and never detected in subsequent revisions. In order for the proviso to make any sense, the word "the" must be substituted for the word "no."

The statute, as presently written, cannot be given a rational interpretation. The use of the word "no" in the proviso makes the

Honorable John J. Johnson

proviso absurd. However, the normal presumption in statutory construction is that the legislature did not intend to enact an absurd law, *State ex rel American Mfg. Co. v. Koeln*, 278 Mo. 28, 211 S.W. 31, 33 (1919). In construing the statute, the basic rule to be followed is to seek the intention of the lawmakers from the words used in the statute, and to give significance and effect to every word, phrase, sentence, and part thereof, if in keeping with that intent. *State ex rel Jones v. Ralston Purina Company, Mo.*, 358 S.W.2d 772, 777 (1962). The courts will correct verbal inaccuracies or clerical errors in statutes whenever necessary to carry out the intention of the legislature. *State ex rel American Mfg. Co. v. Koeln*, 278 Mo. 28, 211 S.W. 31, 33 (1919).

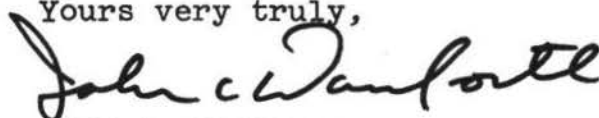
Therefore, in view of the obvious legislative intent here, it is our opinion that Section 247.060, RSMo 1959, should be read as if the proviso said "the vacancy." If a vacancy occurs on the board more than six months before the expiration of the term in which the vacancy occurs, a special election should be held to fill the vacancy.

CONCLUSION

It is our official opinion that the three remaining members of the Board of Directors of the St. Louis County Water Supply District No. 2 should call a special election to fill the vacancies caused by the resignation of two members more than six months prior to the expiration of their terms.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

MS
EMERGENCY VEHICLES:
EMERGENCY EQUIPMENT:
MOTOR VEHICLES:

It is the opinion of this office that a privately owned vehicle, used in transporting emergency equipment such as iron lungs, oxygen and other emergency equipment, responding to emergency calls by doctors is not an ambulance or other emergency vehicle within the meaning of Section 304.022, RSMo 1959. Consequently, it may not display a red light or use a siren on such vehicle.

Opinion No. 66

January 30, 1969

Honorable Donald L. Manford
Representative - 18th District
9409 Oakland Avenue
Kansas City, Missouri 64138



Dear Representative Manford:

This office is in receipt of your letter under date of September 26, 1968, requesting a legal opinion with reference to the following:

An individual is in the business of providing emergency equipment to doctors. This equipment includes such things as portable iron lungs, oxygen and other emergency equipment. It appears that this individual has attempted to make use of a red light and possibly a siren while en route to deliver this emergency equipment, but recently has been advised that he is not authorized to make use of a red light since the vehicle that he uses is not classified as an ambulance. You also advise that this individual uses this vehicle on a 24-hour basis under extreme emergency conditions.

You ask can "such equipment be used by persons who provide such a necessary service?"

Your letter has reflected that this individual has attempted to make use of a red light. Section 304.420, RSMo 1959 specifically provides as follows:

"Headlamps, when lighted, shall exhibit lights substantially white in color; auxiliary lamps, cowl lamps and spot lamps, when lighted, shall exhibit lights substantially white, yellow or

Honorable Donald L. Manford

amber in color. No person shall drive or move any vehicle or equipment, except a school bus when used for school purposes or an emergency vehicle upon any street or highway with any lamp or device thereon displaying a red light visible from directly in front thereof."
(Emphasis added)

The section of the statute herein referred to provides without equivocation that the only vehicles permitted to make use of a red light visible directly in front thereof would be school busses used for school purposes and emergency vehicles. Consequently in order to answer your question, since the vehicle involved is obviously not a school bus, it must be determined as to whether or not it can be defined as an emergency vehicle.

Section 304.022, RSMo 1959, defines the term "emergency vehicle" as follows:

"3. An 'emergency vehicle' is a vehicle of any of the following types:

(1) A vehicle publicly owned and operated as an ambulance, or a vehicle publicly owned and operated by the state highway patrol, police or fire department, sheriff, constable or deputy sheriff, traffic officer or coroner;

(2) Any privately owned vehicle operated as an ambulance when responding to emergency calls;

(3) Any privately owned wrecker, or tow truck or a vehicle owned and operated by a public utility or public service corporation while performing emergency service."

You will note that your question relates to Paragraph 3, Subsection 2 under the definition as to whether or not your vehicle is an ambulance.

The section herein referred to does not define the term "ambulance". We have searched the statutes and court decisions of Missouri for a definition and are unable to find same.

Section 1.090, RSMo 1959 provides "words and phrases shall be taken in their plain and ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." We do not feel that the word "ambulance" has a technical or a peculiar meaning to the average person and consequently must be construed in its plain, usual or ordinary sense.

Honorable Donald L. Manford

Black's Law Dictionary, Fourth Edition, defines an ambulance as follows:

"A vehicle for the conveyance of the sick and wounded."

The same definition may be found in Bouvier's Law Dictionary, Third Edition, Volume 1, page 106.

Inasmuch as there does not seem to be any technical or peculiar meaning to the definition, "a vehicle for the conveyance of the sick and wounded," we are of the opinion that a privately owned vehicle, used in transporting emergency equipment such as iron lungs, oxygen and other emergency equipment, responding to emergency calls by doctors, is not an ambulance within the definition of the statute.

As to the use of a siren, there are three statutory sections to consider that deal with signalling devices.

Section 304.022, supra, refers to the use of a siren by emergency vehicles as defined in the statute. We have already held that the vehicle in question is not an emergency vehicle under Section 304.022, supra, and, therefore, a siren is not authorized by that section.

Paragraph 1 of Section 304.560, RSMo 1959, requires signalling devices on motor vehicles and reads as follows:

"Signaling devices: Every motor vehicle shall be equipped with a horn, directed forward, or whistle in good working order, capable of emitting a sound adequate in quantity and volume to give warning of the approach of such vehicle to other users of the highway and to pedestrians. Such signaling device shall be used for warning purposes only and shall not be used for making any unnecessary noise, and no other sound-producing signaling device shall be used at any time."

It is our opinion that this statute does not include the use of sirens and, therefore, we find no authorization for the use of a siren by Section 304.560.

Finally, Section 304.565, RSMo 1959, allows the use of a siren along with the use of rotating blue lights on motor vehicles used by firemen in bona fide emergencies. The motor vehicle in question clearly does not qualify for a siren under this law.

CONCLUSION

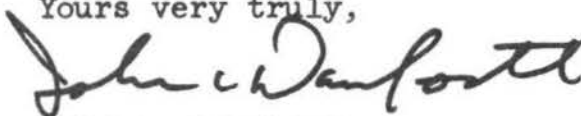
It is the opinion of this office that a privately owned vehicle, used in transporting emergency equipment such as iron lungs, oxygen and other emergency equipment, responding to emergency calls

Honorable Donald L. Manford

by doctors is not an ambulance or other emergency vehicle within the meaning of Section 304.022, RSMo 1959, and therefore such a vehicle may not display a red light visible directly from the front thereof pursuant to the provisions of Section 304.420, RSMo 1959. Further, a siren warning type of device may not be used on the motor vehicle in question.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

ADDENDUM TO OPINION NO. 66-69

The above-captioned opinion concluded that a privately-owned vehicle, used in transporting emergency equipment such as iron lungs, oxygen and other emergency equipment, responding to emergency calls by doctors is not an ambulance or other emergency vehicle within the meaning of Section 304.022, RSMo. Consequently, such a vehicle may not display a red light or use a siren on such a vehicle.

Nothing in this opinion should be read as prohibiting a privately-owned vehicle operated pursuant to Section 304.175, RSMo Supp. 1982, from sounding a warning siren or displaying a blue light. See Opinion No. 83, Matthewson, 1983.



March 3, 1969

Answer by letter-Wieler

OPINION LETTER NO. 68

Honorable Winston V. Buford
Prosecuting Attorney
Shannon County
Court House
Eminence, Missouri 65466

Dear Mr. Buford:

This is in response to your request for an opinion as to whether or not the prosecuting attorney or any other law officer has a right to prepare a list of alcoholics and thereafter notify all taverns and package stores that the people whose names are on this list cannot buy intoxicants.

It is our opinion that this cannot be done. Although Section 311.310, RSMo 1959, prohibits the sale of intoxicating liquor to a habitual drunkard, we have held that a determination of the term "habitual drunkard" is a factual matter to be determined by the Supervisor of Liquor Control or by a court in appropriate proceedings based upon an alleged violation of Section 311.310. See Attorney General Opinion No. 97, Williams, 7-6-53 (copy attached). This being so, we fail to see any legal basis for the publication of a list of alleged alcoholics by the prosecuting attorney or any other law officer for the purpose of compelling retailers to refuse service to the persons on such list.

Such information would in no way establish the fact of habitual drunkenness and, therefore, would not be binding upon any liquor retailer.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 97
7-6-53, Williams

MS

FILED
69

January 8, 1969

OPINION NO. 69
OPINION NO. 408 (1968)
Answered by letter-Mansur

Dr. L. M. Garner
Acting Director
Division of Health
Broadway State Office
Building
Jefferson City, Missouri 65101

Dear Dr. Garner:

This is in response to your letter of October 14, 1968, in which you inquire whether it is necessary for a county which, prior to 1951, voted a tax for establishing, maintaining, and operating a county health center to submit the matters to a vote of the people after 20 years has elapsed before a tax may be levied for future maintenance.

According to the information you submit, several counties, prior to 1951, voted a tax for a period not exceeding 20 years for the establishment, building, maintaining, and operating a county health center together with the necessary personnel; and you inquire whether it is necessary for the question to be submitted again after the 20 year period has elapsed before another tax can be levied.

Section 205.045, RSMo, provides:

"In any county in which a county health center has been established, the rate of tax which has been authorized by the vote of the people of the county shall continue as the maximum rate, and the board of health center trustees shall determine annually the rate of the tax levy up to, but not exceeding, this maximum."

It is the opinion of this department that under this statute a board of trustees of the county health center have authority to determine annually the rate of tax levied up to, but not exceeding,

Dr. L. M. Garner

the maximum rate that was authorized by a vote of the people when the health center was established; and it is not necessary for the matter to be submitted again to a vote of the people. If you have any further questions, please advise.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Answer by letter-Wieler

March 7, 1969

OPINION LETTER NO. 70



Honorable Richard J. Blanck
Prosecuting Attorney
Cooper County
Court House
Boonville, Missouri 65233

Dear Mr. Blanck:

This is in response to your request for an opinion concerning the authority of a County Court in a third class county to compensate a commissioner appointed to sell and dispose of real estate for his services and reimburse him for out of pocket expenses; and whether the County Court can pay an auctioneer hired by the commissioner for his services in conducting such sale.

In order to answer this request, it will be helpful to state the following facts. The real estate involved here was located in Benton County, Missouri. Since Section 49.235, RSMo Supp. 1967, makes it unlawful for a third class county to own real estate in any other state county other than an adjoining county, the County Court of Cooper County appointed a special commissioner to sell the land owned in Benton County. This was done pursuant to the authority granted by Section 49.280, RSMo 1959. The commissioner was given full authority in the appointment order to represent Cooper County with respect to the sale and conveyance of the property. In addition, he was specifically authorized to sell the property at either public or private sale. The commissioner decided to have a public sale and hired an auctioneer to "call" it. No specific arrangements were made with the auctioneer as to compensation, the parties apparently presuming that the rate of payment would be that normally charged by auctioneers in the area.

In this instance, the auctioneer and the commissioner did not enter into a written contract as called for by Section 432.070, RSMo 1959. The law is quite clear that a county cannot be bound by an oral contract. See Attorney General Opinion No. 24, issued to

Honorable Richard J. Blanck

Senator Earl R. Blackwell on February 8, 1962 (copy attached). Therefore, the auctioneer cannot recover against the county for his services.

As to whether the County Court can compensate the special commissioner for his services, it is our opinion that it cannot. Missouri law is quite clear that a public official is not entitled to compensation for his services unless provided for by statute. See Smith v. Pettis County, 345 Mo. 829, 136 S.W.2d 282 (1940). The land commissioner must be considered a public official here, and the statutes are completely silent as to compensation for him.

However, with regard to the commissioner's out of pocket expenses, it is our opinion that he should be reimbursed by the County Court for all the outlays which were bona fide, reasonable and actual expenditures indispensably necessary in carrying out the duties of his office.

It is our feeling that express statutory authority is not necessary to allow reimbursement in those instances where the expense was necessarily incurred in the performance of official duties. See Rinehart v. Howell County, 153 S.W.2d 381, 382 (Mo. 1941).

Therefore, it is our opinion that the Cooper County Court cannot compensate either the special land commissioner or the auctioneer for their services in this instance; but, it can reimburse the special land commissioner for his out of pocket expenses necessarily incurred in the performance of his duties.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 24
2-8-62, Blackwell

Answered by letter-Wieler

April 23, 1969

OPINION LETTER NO. 71

Honorable George J. Pruneau
Prosecuting Attorney
Wayne County
Court House
Greenville, Missouri 63944



Dear Mr. Pruneau:

This is in response to your request for an opinion from this office as to the applicability of Section 564.480, RSMo 1967 Supp. to lands owned by the United States Government, specifically Clark National Forest.

Section 564.480 provides:

"1. No person shall throw or place, or cause to be thrown or placed, any glass, glass bottles, wire, nails, tacks, hedge, cans, garbage, trash, refuse, or rubbish of any kind, nature, or description on the right of way of any public road or state highway or on the navigable waters of this state or on the banks of any navigable stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof, or any political subdivision thereof.

"2. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction, be punished by a fine not less than twenty-five dollars nor more than five hundred dollars or by confinement in the county jail for a term not to exceed one

Honorable George J. Pruneau

year or by both such fine and confinement.

"3. Any peace officer of this state and its subdivisions shall and any agent of the conservation commission or deputy or employee of boat commission may enforce the provisions of this section and arrest violators thereof; except that conservation agents and deputy boat commissioners may enforce these provisions only upon the water, the banks thereof or upon public land."

It is our view that the term "public land" as used in the third subsection of Section 564.480 refers to those enumerated categories in subsection one. Therefore, this statute only refers to littering on the right of way of any public road or state highway, any navigable stream or bank thereof, or any land or water owned, operated or leased by the state or any subdivision thereof.

However, it is our opinion that Section 564.480 can be enforced upon the above enumerated areas within the Forest itself. Clark National Forest was acquired by the federal government during the period 1934 to 1962. See Inventory Report on Jurisdictional Status of Federal Areas Within the States, General Service Administration, June 30, 1962. Consent to these purchases has been given by the state in Section 12.010, RSMo 1959. Also, in Section 12.020, RSMo 1959, the state purports to grant and cede jurisdiction over these lands to the United States reserving to the state authority to serve and execute civil and criminal process issued under authority of the state. But it has been said that this ceding of exclusive jurisdiction is effective only to the extent that the federal government accepts it. See Attorney General Opinion No. 9, issued to Governor Blair on March 6, 1957 (copy enclosed). The intent of the federal government in this matter is very clear. 16 U.S.C.A., Section 480 provides:

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment, thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. * * *"

By this enactment, Congress has declined in effect to accept exclusive jurisdiction over forest reserve lands. In the case of *Wilson v. Cook*, 327 U.S. 474, the Supreme Court of the United States said l.c. 486 and 487:

Honorable George J. Pruneau

"Section 12 of the federal statute, authorizing the purchase, provided: 'That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated, shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State.'

"By this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect nor the inhabitants 'be absolved from their duties as citizens of the State.' . . ."

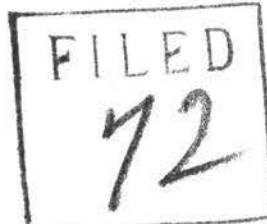
Therefore, it is our opinion that Section 564.480, RSMo 1967 Supp. does apply to public roads or state highways, navigable waters and the banks thereof, and lands or waters owned, operated, or leased by the state or any subdivision thereof within the Clark National Forest.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 9
3-6-57, Blair

February 24, 1969



OPINION NO. 72
Answered by Letter
Culver

Dr. Earl E. Dawson, President
Lincoln University
Jefferson City, Missouri 65101

Dear Dr. Dawson:

This is in response to your request for an opinion of this office regarding the proposal to establish a retirement, death and disability program for the employees of Lincoln University similar to the one in effect at Missouri University. You ask us the following:

- (1) "Does the Lincoln University Board of Curators have the power and authority to set up such a plan?"
- (2) "What procedural steps are necessary in effecting the transfer of membership of Lincoln University employees from the State Retirement System to a Lincoln University retirement system?"

In reply to your first question, it is our opinion that your Board of Curators has the power and authority to establish such a retirement program for Lincoln University employees. This is based on the fact that Section 172.300, RSMo 1959, which provides the Curators of the University of Missouri with retirement program authority, is in effect incorporated by reference into the authority given your Board under the provisions of Section 175.040, RSMo 1959, which provides that your "powers, authority, responsibilities, privileges, immunities, liabilities and compensations" shall be the same as those of the University of Missouri. We refer you on this point to two previous opinions of this office in response to your inquiries: No. 21, dated December 10, 1957, and No. 460, dated November 26, 1963, copies of which are enclosed.

Dr. Earl E. Dawson, President

Regarding your second question, we refer you to a previous opinion of this office, No. 51, rendered to the Honorable Robert R. Welborn, January 18, 1962 (copy enclosed), which basically held that the University of Missouri could "amend" its retirement plan by establishing a separate one of their own, and that University employees formerly belonging to the State Employees' Retirement System (Sections 104.310 - 104.550, RSMo 1959, RSMo Cum. Supp. 1967) thereby terminated their membership in the state system, with certain exceptions as noted in the opinion. Clearly, Lincoln University has the same authority, through its Board of Curators, to establish an employees' retirement plan.

Our office has previously held that the General Assembly may, pursuant to Article VI, Section 25, Constitution of Missouri, appropriate money to the Board of Curators at Missouri University which may be used at the discretion of the Board for providing retirement benefits for University employees. See Opinion No. 209, Mann, dated August 15, 1966, a copy of which is enclosed. Also enclosed is a copy of a previous opinion of this office, No. 347, Bode, dated August 30, 1966, which provides that a member of the Missouri State Employees' Retirement System may withdraw his contributions upon written request for refund to the Board of Trustees.

It is therefore the opinion of this office that Lincoln University, through its Board of Curators pursuant to Sections 175.040 and 172.300 RSMo 1959, has the authority to establish a retirement, death and disability program for the employees of Lincoln University, which could be paid for from appropriated state funds. It is further our opinion that the only procedural step necessary to transfer membership of Lincoln University employees from the state retirement system to the Lincoln University retirement system, in accordance with the previous opinions construing the state retirement system provisions of Chapter 104, RSMo 1959 referred to and enclosed herein, is for the employees with less than fifteen years of service to request in writing that their funds be withdrawn, with interest, from the Missouri State Employees' Retirement System; employees with more than fifteen years of service may elect to leave their funds on deposit with the State System, thus continuing as a "member" of the system to the extent that they have already

Dr. Earl E. Dawson, President

contributed, in anticipation of receiving those benefits to which their previous contributions may entitle them when they reach statutory retirement age.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Opinion No. 21, Dawson, 12/10/57
Opinion No. 460, Dawson, 11/26/63
Opinion No. 51, Welborn, 1/18/62
Opinion No. 209, Mann, 8/15/66
Opinion No. 347, Bode, 8/30/66



January 8, 1968

OPINION No. 73-1969
419-1968

Answered by letter (Burns)

Honorable Charles B. Faulkner
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Mr. Faulkner:

This is in answer to your letter of recent date requesting the refusal of Western Telephone Company to place devices on telephone lines to determine what lines are being used for harassing and obscene telephone calls. You state that the telephone company refuses to place such devices on the telephone lines unless they are ordered to do so by a court. We are unable to find any authority for any court to make such an order.

We are referring your letter to Mr. Frank D. Hequembourg, Director of Utilities of the Public Service Commission of Missouri. He will look into the matter to determine what, if any, action can be taken by the Public Service Commission in this matter.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

EMINENT DOMAIN:
UNITED STATES:
TAXATION-REAL PROPERTY:

Filing of declaration of taking and
deposit of estimated compensation
in court vests title to land in
United States government under Federal
condemnation law (40 U.S.C.A. § 258 a)
so as to remove land from tax rolls
in succeeding calendar year.

MS

OPINION NO. 76



January 30, 1969



Honorable Winston V. Buford
Prosecuting Attorney
Shannon County
Eminence, Missouri 65466

Dear Mr. Buford:

This is in response to your recent letter requesting an opinion on the taxable status of certain land in Shannon County, Missouri, land that was the subject of condemnation proceedings by the United States Government in the year 1967. You specifically requested whether the county collector should ". . . abate these taxes for the 1968 tax year in favor of the individual land owners."

Section 43 of Article III, Missouri Constitution of 1945 provides that:

". . . No tax shall be imposed on lands the property of the United States; . . ."

The federal statute by which the United States Government condemns land reads in pertinent part as follows:

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, . . ." (40 U.S.C.A., § 258 a)

Honorable Winston V. Buford

Although this statute needs very little interpretation, the federal courts have consistently stated that legal title passes to the United States Government upon the filing of the declaration of taking and the deposit in court of the estimated compensation for the land. *Covered Wagon, Inc., v. Commissioner of Internal Revenue*, 369 F.2d 629 (8th Circuit, 1966); *Collector of Revenue, the City of St. Louis, v. The Ford Motor Company*, 158 F.2d 354 (8th Circuit, 1946). You state that the United States Attorney filed declarations of taking in 1967, and you have subsequently informed us that the estimated compensation was simultaneously deposited in court. Since the deposit was made in 1967, it of course follows that title vested in the United States Government in 1967. Since the lien for 1968 Missouri Real Property Taxes accrues as of January 1, 1968, (§ 137.075, RSMo 1959; *St. Louis Provident Ass'n. v. Gruner*, 199 S.W.2d 409 (Div. 1, 1947)) the property for which declarations of taking had been filed and estimated compensation deposited in court prior to January 1, 1968, is tax exempt. *United States v. Certain Land in City of St. Louis*, 86 F.Supp. 297 (E.D., Mo., 1949), *United States v. Certain Land in Jackson County, Missouri*, 69 F.Supp. 565 (W.D., Mo., 1947), *United States v. Certain Land in City of St. Louis*, 51 F.Supp. 80 (E.D., Mo., 1943).

If 1968 taxes have not been paid on the land acquired by the United States in 1967, the County Court may upon application order the assessment on the land removed from the tax books (§ 137.-270, RSMo 1959) and the county clerk shall make the correction (§ 137.260, RSMo 1959). Alternatively, the County Court may order the tax books as to this condemned land corrected on the first Monday in March (§§ 139.160, 139.170, RSMo 1959) when they consider the delinquent tax lists (§ 140.040, RSMo 1959).

CONCLUSION

It is the opinion of this office that filing of declaration of taking and deposit of estimated compensation in court vests title to land in United States government under Federal condemnation law (40 U.S.C.A. § 258 a) so as to remove land from tax rolls in succeeding calendar year.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louren R. Wood.

Yours very truly,



JOHN C. DANFORTH
Attorney General

MC

NATIONAL FOREST RESERVE FUNDS: It is the opinion of this office
SCHOOL AND ROAD MAINTENANCE: that the county court of any county
DISTRIBUTED BY COUNTY COURT: receiving funds from the United
States under the National Forest
Reserve Act shall distribute such funds to aid in maintaining the
schools and roads of school districts that lie or are situated
partly or wholly within or adjacent to the national forest in the
county upon any basis which, in its discretion, the court deter-
mines to be proper.

Opinion No. 77

February 4, 1969



Honorable Urban C. Bergbauer, Jr.
Prosecuting Attorney
Iron County
Ironton, Missouri 63650

Dear Mr. Bergbauer:

This office is in receipt of your request for a legal opinion in regard to the distribution of National Forest Reserve Funds to various school districts within a county. Your letter reads in part as follows:

"The point has recently been raised by one of the school districts in Iron County that the distribution to the school districts should be made in accordance with the formula suggested in Section 12.100, Vernon's Annotated Missouri Statutes, that is, the amount should be based upon the respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned. This point has been raised by one of the school districts because they believe that certain properties lying within their district should have a higher valuation placed thereon because of certain mining activities going on, thereby giving them a greater portion of the available fund."

Honorable Urban C. Bergbauer, Jr.

Your first inquiry reads as follows:

"1. If the National Forest Funds received by the county from the state are expended solely for the benefit of the public roads and public schools of the county should the distribution to the various school districts of the county be based on strictly an acreage formula similar to that in Section 12.070, Vernon's Annotated Missouri Statutes, which is used to determine the distributable amounts from the state to the counties?"

Section 12.070, RSMo 1959, provides the manner in which funds received by the State of Missouri from the National Forest Reserve Funds should be distributed to the counties and reads as follows:

"All sums of money received from the United States under an act of congress, approved May 23, 1908, being an act providing for the payment to the states of twenty-five per cent of all money received from the national forest reserves in the states to be expended as the legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated (16 U.S.C.A. § 500) shall be expended as follows: Seventy-five per cent for the public schools and twenty-five per cent for roads in the counties in which national forests are situated. The funds shall be used to aid in maintaining the schools and roads of those school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county. The distribution to each county from the proceeds received on account of a national forest within its boundaries shall be in the proportion that the area of the national forest in the county bears to the total area of the forest in the state, as of June thirtieth of the fiscal year for which the money is received."

Such section provides that seventy-five per cent of the funds received by the state under the National Forest Reserve Act shall be expended for schools and twenty-five per cent for roads in those school districts that lie or are situated partly or wholly within or adjacent to a national forest in the county. It should be noted that this section does not authorize any of the money so

Honorable Urban C. Bergbauer, Jr.

received to be expended for county government. It should also be noted that Section 12.070 has no provision that funds received by the county from the national forest reserves shall be apportioned upon an acreage basis; therefore, the county court is not required by Section 12.070 to distribute the money on this basis.

Section 12.080, RSMo 1959, provides the county court shall direct the expenditure of money received from the United States under the Flood Control Act for the benefit of the schools and roads of the county in which the government land is located or for defraying the expense of county government of such county. Said section refers to funds received under the Flood Control Act only and the purposes for which such funds can be spent and is inapplicable to the receipt and expenditure of funds under the National Forest Reserve Act.

Section 12.100, RSMo 1959, provides how funds received from the United States under provisions of the foregoing sections shall be used. Said section reads as follows:

"The county court of each county receiving any such moneys shall use the funds to aid in maintaining the schools and roads and for defraying any of the expense of the county in accordance with the provisions set forth in Sections 12.070 and 12.080. The county court shall allow to the school districts and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of the moneys for defraying other expenses of the county." (Underscoring ours)

Although Section 12.100, supra, provides that upon receipt of the money the county court of any such county shall use the funds in maintaining schools and roads and for defraying any county government expense, in accordance with the provisions of Sections 12.070 and 12.080, the second sentence of Section 12.100 is inapplicable to Section 12.070. Section 12.070 authorizes the use of funds received from the National Forest Reserves for maintaining schools and roads of those school districts partly, wholly within or adjacent to a national forest of the county receiving the funds, and no part of the funds can be used for county government expense. However, this is not true with reference to funds received under the Flood Control Act, as Section 12.080 authorizes the county court of the county where the government land is situated to use the funds in maintaining schools and roads of the county, as well

Honorable Urban C. Bergbauer, Jr.

as for the expenses of county government. The second sentence of Section 12.100 is applicable only to Section 12.080 and not to Section 12.070.

In this connection, we note that neither Section 12.070 nor Section 12.080 contains a formula by which the county court shall distribute funds.

Section 12.100 requires the county court to allow an amount to the school districts and for roads based upon their respective levies and equal to that ordinarily allowed them out of taxes upon United States owned property, if privately owned, before using any of the funds received under the Flood Control Act for county expenses but does not require the county court to apportion forest reserve funds in any specific way.

Therefore, our answer to your first inquiry is that the distribution of funds received under the Forest Reserve Act is not required to be based on an acreage formula.

Your second inquiry reads as follows:

"2. If the answer to question No. 1 above is in the negative, then should the formula used in Section 12.100, Vernon's Annotated Missouri statutes be used?"

Our answer to the second inquiry is that the provisions of Section 12.100 relating to allowance of funds do not apply to funds received under the National Forest Reserve Act for the reasons given in our discussion of the first inquiry, which are believed to be unnecessary to repeat here. There is no formula in Section 12.100 for distribution of funds received under the National Forest Reserve Act.

Your third inquiry reads as follows:

"3. If the formula in Section 12.100, Vernon's Annotated Missouri Statutes is used, what method of valuation should be used to determine the value of government owned property within a school district when certain of that property, if used for private purposes, would have a much higher valuation than other."

Again, we point out that Section 12.100, supra, contains no formula to be followed by the county court in distributing the funds received from the National Forest Reserves. The county court is authorized to make distribution of National Forest

Honorable Urban C. Bergbauer, Jr.

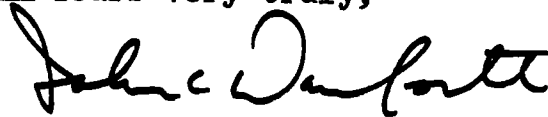
Reserve Funds upon any basis, which in its discretion, the court determines to be proper.

CONCLUSION

It is the opinion of this office that the county court of any county receiving funds from the United States under the National Forest Reserve Act shall distribute such funds to aid in maintaining the schools and roads of school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county upon any basis which, in its discretion, the court determines to be proper.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

FILED

78

78-69

February 18, 1969

OPINION NO. 78
Answer by Letter
Gardner

Mrs. Olean Barton, Secretary
State Board of Registration for
Architects and Professional
Engineers
Box 184
Jefferson City, Missouri 65101

Dear Mrs. Barton:

Reference is made to the letter dated October 29, 1968, which the State Board of Registration for Architects and Professional Engineers received from Mr. James T. Darrough, President, Missouri Association of Registered Architects, requesting that you obtain a legal opinion from this office for such organization.

If time permitted and if our laws allowed, we would like to be able to render opinions in answer to the many inquiries we receive. However, our office receives many letters each day and there just isn't sufficient manpower available to do the extensive work which is necessary to prepare opinions on each inquiry. Having this in mind, our legislature, many years ago, passed a statute which restricted the authority of the Attorney General to render official opinions to certain specified public officials on matters concerning their official duties (Section 27.040 RSMo) and, thus, we are limited by this statute.

It would be our suggestion that Mr. Darrough discuss all the facts and circumstances with an attorney who is in a

Mrs. Olean Barton, Secretary

position to advise him with respect to the legal problems
confronting the Missouri Association of Registered Architects
and the members of that association.

Very truly yours.

JOHN C. DANFORTH
Attorney General

COUNTY CLERKS:
DEPUTY COUNTY CLERKS:
FEES, COMPENSATION AND SALARIES:

The County Clerk of a third class county may employ as many deputies as he determines to be necessary. Paragraph 3 of Section 51.450 RSMo Supp.

1967 does not allow \$1000.00 for each deputy employed by the county clerk but does allow one flat sum of \$1,000.00 regardless of the number of deputies. Paragraph 2 of Section 51.450 RSMo Supp. 1967 permits the county court to allow an additional sum not to exceed \$1,000.00 for deputies and assistants hire. Such additional sum is not allowed for each individual deputy. County Clerks cannot be paid extra remuneration for performance of their official duties relating to casting up the votes given to candidates at elections.

OPINION NO. 79

February 27, 1969



Honorable Thomas O. Pickett
Prosecuting Attorney
Grundy County
924 Main Street
Trenton, Missouri

Dear Mr. Pickett:

This is in answer to your letter of recent date requesting an official opinion, reading as follows:

- "(a) How many deputies may the County Clerk of a county of the Third Class with a population of more than 7,500 and less than 15,000 employ?
- "(b) Are the amounts set forth by Section 51.450-1-(2), Section 51.450-3 and the additional compensation set forth in Section 51.450-2 the total amounts which may be spent by the county clerk in employment of his deputies, or do these Sections, particularly the first two, apply for each deputy employed?
- "(c) Is the county clerk and/or his deputies authorized to receive additional compensation for canvassing and counting absentee ballots and inspecting the poll books?"

Section 51.450, RSMo Supp. 1967 provides in part as follows:

"Deputies-compensation (class three counties). —
1. The clerk of the county court in each county of the third class is entitled to employ deputies

and assistants, and for the deputies and assistants,
is allowed the following sum:

* * * * *

"(2) In counties with a population of seven
thousand, the sum of sixty-five per cent of the
salary of the county clerk;"

The statute we feel is specific and clear in that it vests in the clerk of the county court the right to hire deputies and assistants. The legislature made no mention as to the number of such deputies or assistants. We believe that the number of employees is discretionary with the county clerk. In other words in a class three county the sum of sixty-five per cent of the county clerk's salary has been made available for the employment of deputies and assistants in any number needed under subsection 2 of paragraph 1 of Section 51.450. The clerk has discretion to hire as many such deputies and assistants as he wishes.

The statute obviously does not contemplate the allowance of sixty-five per cent of the clerk's salary for each and every deputy or assistant the clerk may see fit to employ.

Paragraph 2 of Section 51.450, RSMo Supp 1967 provides:

"The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed one thousand dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of the county; but the county court shall determine that the work required to be done by the clerks demands or requires the extra remuneration."

It is clear that the legislative intent in paragraph 2 of Section 51.450 is that the determination whether an additional sum not in excess of one thousand dollars for deputies' or assistants' hire shall be allowed is entirely in the discretion of the county court and that such sum is the maximum amount that may be allowed for all deputies and assistants under such paragraph.

Paragraph 3 of Section 51.450 RSMo Supp. 1967 is as follows:

"In addition to salaries fixed by this section the deputy county clerk shall receive one thousand dollars a year payable out of the county treasury."

Honorable Thomas O. Pickett -

In tracing the history of Section 51.450 RSMo we find that paragraph 3 first appeared in 1959, L. 1959, S.B. 63.

At the time such paragraph was enacted the county clerk was authorized to employ as many deputies and assistants as he wished but the deputies and assistants could not be paid a total amount in excess of that authorized by what are now paragraphs 1 and 2 of Section 51.450.

We believe it to be clear that the reference to the deputy county clerk in paragraph 3 shows that the legislative intent is that the sum of one thousand dollars is to be paid to one deputy clerk if there is only one deputy or such sum may be divided among several deputy clerks if there be more than one deputy. There is no provision in such paragraph for an additional payment of one thousand dollars annually to each deputy clerk but the paragraph contemplates a payment of one thousand dollars additional annually for hire of a deputy or deputies. If each deputy were entitled to payment of one thousand dollars annually in addition to the salary set for each deputy by the county clerk under paragraph 1 of Section 51.450 the county clerk could require the payment of great sums of money for deputy hire by appointing scores of deputies since he can appoint such number of deputies as he sees fit. Section 51.450 which in other paragraphs limits the amounts that are to be paid for deputy hire clearly provides in paragraph 3 payment of one thousand dollars for all deputy county clerks.

You have asked whether the county clerk is entitled to receive additional compensation for canvassing and casting absentee ballots and inspecting the poll books.

We know of no requirement that the clerk or his deputies count absentee ballots. Section 112.060 RSMo provides that the clerk shall appoint not less than four disinterested persons from lists furnished by the two dominant political parties who count absentee ballots. We assume you are inquiring concerning the clerk's duties as set out in such section.

We also assume your question as to inspecting the poll books concerns the clerk's duties under Section 111.710, RSMo providing that the county clerk shall with one assistant from each of the political parties casting the highest number of votes at the last preceding general election examine and cast up the votes within five days after each election.

We find no statutory provision for any payment to be made to the county clerk for the performance of his duties relating to canvassing the ballots.

The general rule is that an officer is not entitled to compensation unless compensation is authorized by statute. This rule was enunciated in the case of King v. Riverland Levee District 279 SW 195. In that case the St. Louis Court of Appeals said l. c. 196.

Honorable Thomas O. Pickett -

"***Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same.***"

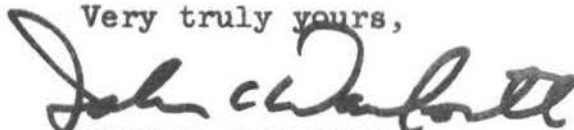
CONCLUSION

It is the opinion of this office that:

1. The County Clerk of a third class county may employ as many deputies as he determines to be necessary.
2. Paragraph 3 of Section 51.450, RSMo Supp. 1967 does not allow \$1,000.00 for each deputy employed by the county clerk but does allow one flat sum of \$1,000.00 regardless of the number of deputies.
3. Paragraph 2 of Section 51.450, RSMo Supp. 1967 permits the county court to allow an additional sum not to exceed \$1,000.00 for deputies and assistants hire. Such allowance is discretionary with the county court. Such additional sum is not allowed for each individual deputy.
4. County Clerks cannot be paid extra remuneration for performance of their official duties relating to casting up the votes given to candidates at elections.

The foregoing opinion, which I hereby approve, was prepared by my Assistant C. B. Burns, Jr.

Very truly yours,


JOHN C. DANFORTH
Attorney General

AMBULANCES:
COUNTY HOSPITALS:
COUNTY COURTS:
HOSPITALS:
SPECIAL TAX LEVIES:
COOPERATIVE AGREEMENTS:

A county hospital organized under the provisions of Section 205.160, RSMo, et seq., may contract with the county court of the county wherein they are located for such ambulance services as the hospital board of trustees deem necessary and appropriate to the needs of the hospital and the hospital board of trustees may likewise as a part of such contract provide facilities for the housing of the ambulance vehicles.

August 7, 1969

OPINION NO. 80

Honorable Dennis C. Brewer
Prosecuting Attorney
Perry County Courthouse
Perryville, Missouri 63775



Dear Mr. Brewer:

This opinion is in response to your question concerning the validity of a plan for the furnishing of ambulance service whereby the county court of Perry County will contract on behalf of Perry County with a private individual to operate a county ambulance service, and in turn, the Perry County Memorial Hospital will contract with the Perry County Court to provide ambulance services for the patients of the hospital using special tax levy funds pursuant to Section 205.200, RSMo Supp. 1967. An additional question presented is whether or not the Perry County Memorial Hospital can provide facilities for the housing of the ambulances used for these services.

In our opinion which was directed to you under date of December 5, 1968, No. 290, we stated that a county hospital organized under the provisions of Section 205.160, RSMo et seq., may establish and maintain an ambulance service supported in whole or in part by special tax levy funds pursuant to Section 205.200, RSMo Supp. 1967. We also stated that such ambulance service may not be a general service, but must be in direct connection with the services rendered county hospital patients.

It is our understanding that the contract between Perry County and the individual operating the ambulance service is

Honorable Dennis C. Brewer

pursuant to the provisions of Section 67.300, RSMo Supp. 1967. Two of the basic questions, therefore, are answered. That is, the county court acting pursuant to Section 67.300, RSMo Supp. 1967, can contract with an individual to operate an ambulance service for the county. Likewise, we have stated that the county hospital can use special tax funds to provide an ambulance service that is directly related to the operation of the hospital. The remaining questions, therefore, are whether the Perry County Memorial Hospital Board of Trustees can contract with the Perry County Court to provide the ambulance services for and directly related to the operation of the Perry County Memorial Hospital and whether the Perry County Hospital Board of Trustees have the authority to build a shelter for these ambulances.

Section 205.190, RSMo 1959, gives the Perry County Memorial Hospital Board of Trustees the authority to perform certain acts in order to carry out its duties and exercise its powers. In order to do this, they necessarily must have the right of contract and are able to contract with others for the performance of services and functions of a delegable nature. Aslin v. Stoddard County, 106 S.W.2d 472, 341 Mo. 138. Obviously there is nothing in the performance of ambulance services as such which cannot be delegated or made the subject of a lawful contract. Since we have concluded that the board of trustees can provide an ambulance service related to the needs of the hospital, it necessarily follows that they have the right to contract with others for such services.

With respect to the question as to whether the county court can contract with the county hospital board of trustees to furnish such services, we take note that under the provisions of Section 67.300, the county court "may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury". Thus, the county court has the power to provide such service, but is not required to do so; and as a consequence, a contract with the hospital board of trustees to furnish ambulance services for the direct needs of the county hospital would be proper.

The existence of the power to do the act contemplated by the contract distinguishes this situation from one which calls for the furnishing of services by the county to persons or organizations where such power does not exist.

Under these circumstances, it is not necessary to determine whether this type of contract falls within the provisions of the cooperative agreement statutes, Section 70.210, RSMo, et seq.,

Honorable Dennis C. Brewer

for the reason that the right to contract in this instance exists independently of any statutory authority given political subdivisions to cooperate as provided under that law. Notably, the "sharing of facilities" is nothing new in our government, St. Louis Co. v. Ruland, 5 Mo. 269, 1.c. 272.

Further, it is our opinion that the Perry County Memorial Hospital Board of Trustees does have the authority to build parking facilities for ambulances with the special tax levy funds pursuant to Section 205.200, RSMo Supp. 1967, for the same reasons that we stated previously; that is, that they have the authority to provide ambulance services related to the needs of the hospital.

CONCLUSION

It is therefore the opinion of this office that a county hospital organized under the provisions of Section 205.160, RSMo et seq., may contract with the county court of the county wherein they are located for such ambulance services as the hospital board of trustees deem necessary and appropriate to the needs of the hospital and the hospital board of trustees may likewise as a part of such contract provide facilities for the housing of the ambulance vehicles.

This opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answered by letter (Burns)

March 28 , 1969



OPINION LETTER NO. 81



Honorable Charles S. Broomfield
State Representative
87th District
4801 North Lister
Kansas City, Missouri

Dear Mr. Broomfield:

This is in response to your request for an opinion concerning the legality of offering gifts to encourage voters to register. Enclosed with your request was a copy of an advertisement distributed by a Development Company stating in part:

" "Because we feel it is vital for each NKC resident to exercise his right at the ballot box, the Development Company is offering a \$10 gift certificate to all of its residents who can prove they have registered since January, 1968. We hope this inducement will help sand more of Northtown's voters to the polls."

We are unable to find any provisions in the statutes of Missouri making unlawful a corporation's or an individual's promising to pay or to give a gift certificate to another person who registers as a voter. Chapter 129 RSMo, the corrupt practice law of Missouri, does contain many sections relating to unlawful activities in connection with elections but does not make unlawful giving a gift certificate to one who registers as a voter.

Section 129.680 RSMo makes unlawful certain activities regarding registration of voters but nowhere in such section is there found any provision prohibiting the offering of a gift or reward to an individual who registers to vote.

Section 129.010 RSMo provides that a person shall be deemed guilty of bribery when he directly or indirectly offers or promises any money or valuable consideration to any voter in order to induce such voter to vote or refrain from voting.

However, it is our view that such section does not in anyway relate to registration of voters but relates only to inducing an individual to vote

Honorable Charles S. Broomfield

or refrain from voting.

In the absence of any statute making unlawful the offering of a gift or reward for registering as a voter, it is our view that such offering of a gift or reward is not unlawful.

Yours very truly,

JOHN.C. DANFORTH
Attorney General

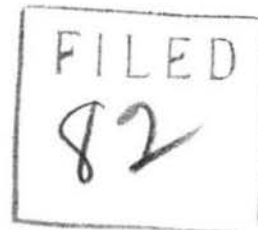
ADITORS:
SALARIES:
ADDITIONAL COMPENSATION:

The right of the County Auditor to payment of the additional compensation provided by Section 55.097, RSMo Cum. Supp., is conditioned upon the actual performance of the duties imposed by Section 55.175, RSMo Supp. 1967, including the making of an annual

audit of the accounts and records of the county health center, county planning and zoning commission and the county building commission. In counties where these facilities do not exist, the auditor cannot meet the conditions imposed by the statute and therefore cannot acquire a right to payment of the additional compensation provided in Section 55.097.

OPINION NO. 82

March 4, 1969



Honorable Frank Conley
Boone County Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201

Dear Mr. Conley:

This is in response to your request for an opinion as follows:

"On January 1, 1969, Boone County will become a second class County and eligible for appointment of a County Auditor. Section 55.090 RS Mo., 1959, provides that the sum of \$5,000.00 for his performances. Sections 55.095 and 55.161 RS Mo., 1959, provide that the County Auditor shall be paid an additional \$1,000.00 for his performance of certain additional duties.

"Section 55.097 RS Mo., 1959, provides that the Auditor shall be paid an additional \$2,000.00 for the performance of certain additional duties set forth in 55.175 RS Mo., 1959, which involve auditing the County Health Center, the Planning and Zoning Commission and the Planning and Building Commission. Boone County does not have a County Health Center, Planning and Zoning Commission or Planning and Building Commission, hence, there will be no additional duties in this area to be performed at this time.

Honorable Frank Conley -

"In view of the fact that the particular agencies to be audited under 55.175 RS Mo., 1959, do not now exist within this County, is the County Auditor entitled to the additional \$2,000.00 compensation?"

The additional compensation to which you refer is provided in Section 55.097, RSMo Cum. Supp. 1967, as follows:

"For the performance of the duties imposed by section 55.175, the county auditor shall receive, in addition to all other compensation provided by law, two thousand dollars per annum."

Section 55.175, RSMo Cum. Supp. 1967, provides:

"The county auditor in counties of the second class shall make an annual audit of the accounts and records of the county health center, county planning and zoning commission and the county building commission, and report the condition of the accounts to the county court."

The question presented is whether the right to the additional compensation provided by Section 55.097 arises from an amount fixed by the General Assembly as salary or compensation incidental to the Office of the County Auditor, or whether it arises from the rendition of services through the performance of the duties specified in the statute. We are, therefore, confronted with a problem in statutory construction.

The fundamental purpose in statutory construction is to ascertain and give effect to the legislative intent. In construing a statute and arriving at the intent thereof, it is proper and helpful to consider its historical development. Kansas City v. Travelers Insurance Company, 184 S.W.2d 874.

One of the accepted canons of statutory construction permits and often requires an examination of the historical background of the legislation, including changes therein and related statutes. State v. Atterbury, 270 S.W.2d 399. Section 55.095, RSMo 1959, is a related statute, inasmuch as it also provides additional compensation for additional duties by the County Auditor, as follows:

"For the additional duties provided in section 55.161, the county auditor shall receive, in addition to the compensation provided in

Honorable Frank Conley -

section 55.090, the sum of one thousand dollars, payable monthly in equal installments out of the general revenue fund of the county by warrants drawn on the county treasurer."

An examination of the historical development of Sections 55.095 and 55.097 discloses how the policy of the General Assembly with respect to additional compensation for additional duties by the Auditor in Class two counties has been changed or modified.

Section 55.095 was first enacted in 1951 and, at that time, it included the following provision at the end of that section:

"... provided however, that the county auditor for all services rendered shall not receive as total compensation in excess of five thousand dollars (\$5,000.00)."

In 1959, the General Assembly repealed Section 55.095 and re-enacted it with the foregoing provision deleted (L. 1959, S.B. 196, Section 1). By such action the General Assembly expressed a policy of not only removing a condition it had previously placed on the right of the Auditor to receive additional compensation, but it also fixed the additional compensation authorized by Section 55.095 as a part of the annual salary provided for the Office of County Auditor, and permanently attached it to that office.

A different policy was expressed by the General Assembly in the action taken after the decision of State v. Carpenter, 388 S.W.2d 823, to which you called attention in your opinion request. This decision was handed down March 8, 1965, while Sections 55.097 and 55.175, which were paragraphs 1 and 2 of S.B. 122 in the Seventy-Third General Assembly, were approved July 9, 1965.

In State v. Carpenter the Court held that the superintendent of the county schools was entitled to additional compensation for the duties of supervising transportation, even though no such duties existed in the county. In reaching that conclusion, the Court pointed out that "the sums here involved are salary" and "the fact that he does not perform all or any of its duties will not affect the right to the salary attached thereto unless the statute otherwise provides". The Court also stated "the General Assembly could have attached conditions to the superintendent's right to receive additional compensation, but it did not do so".

The Court, therefore, makes a distinction between statutes from which the right to additional compensation arises as an incident to the office, and statutes from which the right to additional compensation arises from the rendition of services.

Honorable Frank Conley -

Following, and apparently prompted by this decision, the General Assembly enacted Section 55.097 and in this section attached a condition to the Auditor's right to receive additional compensation, this condition being "for the performance of the duties imposed by Section 55.175". The attachment of this condition is in harmony with State v. Carpenter and discloses a clear legislative intent that the right to additional compensation is dependent upon performance of the additional duties.

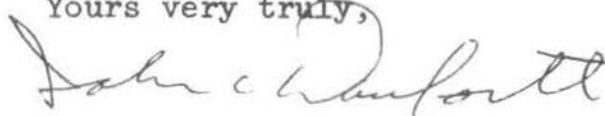
The duties imposed by Section 55.175 are specific. Where specific compensation is given by law to a public officer for the performance of specific duties, as in Section 55.097, it would seem he is not entitled to compensation unless he performs the duties. In this instance, having performed no additional duties and having rendered no additional services to the county, there is nothing upon which he can predicate a right to additional compensation.

CONCLUSION

Therefore, it is the opinion of this office that the right of the County Auditor to payment of the additional compensation provided by Section 55.097, RSMo Cum. Supp. is conditioned upon the actual performance of the duties imposed by Section 55.175, RSMo Supp. 1967, including the making of an annual audit of the accounts and records of the county health center, county planning and zoning commission and the county building commission. In counties where these facilities do not exist, the auditor cannot meet the conditions imposed by the statute and therefore cannot acquire a right to payment of the additional compensation provided in Section 55.097.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

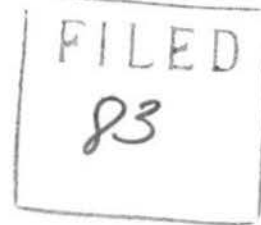
Yours very truly,



JOHN C. DANFORTH
Attorney General

ANSWER BY LETTER: ASHBY

October 14, 1969



OPINION LETTER NO. 83

Mr. Richard E. Snider
First Assistant Prosecuting Attorney
14 North Pacific
Cape Girardeau, Missouri 63701

Dear Mr. Snider:

We have your letter, which reads as follows:

"Erlbacher Materials Inc. 1300 Water Street
Cape Girardeau Missouri is a dealer in construction earth moving equipment and have been issued dealers plates by the Department of Revenue.

Periodically they travel to St. Joseph, Missouri where they purchase, in this instant a loby and caterpillar tractor; placed their dealer plate on the loby and on the tractor pulling the loby, loaded the caterpillar tractor on the loby and returned to Cape Girardeau where the loby and caterpillar tractor are displayed for sale.

Recently they were stopped by the Missouri State Highway Patrol and arrested for improper use of dealer's plates and forced to purchase registration plates for the loby and tractor (which of course included payment of the sale tax) before being allowed to proceed.

Mr. Richard E. Snider

Examination of Vernon's Annotated Missouri Statutes Sections No. 301.130; 301.140; 301.170 and 301.250 lead me to believe that their activity is a proper use of their dealer's plates and that they are not in violation of the Missouri law."

The pertinent portion of Section 301.250, RSMo 1959, reads as follows:

"1. All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make a verified application upon a blank to be furnished by the director of revenue, for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain:

* * * *

3. The dealer plates may be displayed on any motor vehicle used by an employee or officer and owned by the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer hired or loaned to others or upon any regularly used service or wreck-er vehicle.

4. The director of revenue shall use all due diligence to ascertain whether applicant is a dealer in fact, and he may regulate the number of plates furnished each dealer. For the purposes of this section a dealer is any person, firm, corporation, association, agent or sub-agent, engaged in the business of selling or exchanging new, used, or reconstructed motor vehicles or trailers and who buys and sells, or exchanges four or more new, used or reconstructed motor vehicles or trailers in any one calendar year."

Reviewing the facts, the dealer drove his regularly used service vehicle (or tractor) to St. Joseph where they picked up a loby and caterpillar (both of the latter for resale) from another dealer or manufacturer. They placed the licenses or dealer plates on the loby and tractor and had started to return to Cape Girardeau when arrested.

Mr. Richard E. Snider

The use of the dealer plate on the loboy was proper under Section 301.250 (sub-par. 3) supra, since the loboy was for resale and was not being "displayed on any motor vehicle or trailer hired or loaned to others or upon any regularly used service or wrecker vehicle".

However, the tractor being a "regularly used service vehicle" as we understand the facts was specifically denied the use of the dealer plate (see sub-par. 3, Section 301.250, supra).

It seems to us that the language of the statute is clear and unambiguous and by definition, we believe the dealer violated the proscription of sub-par. 3, Section 301.250, supra, by using the dealer plates on his "regularly used service vehicle".

We have assumed for purpose of this opinion that the tractor was a regularly used service vehicle.

We do not feel Section 301.130, 301.140 and 301.170, RSMo 1959, are applicable to this situation.

For the reasons above stated, we have concluded the use of the dealer plates on the loboy was proper but the use of the dealer plates on a regularly used service vehicle was in violation of Section 301.250, RSMo 1959.

If you have any further questions, please feel free to request the opinion of this office.

Very truly yours,

JOHN C. DANFORTH
Attorney General

February 18, 1969



Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This letter is in response to your request for a legal opinion as to whether or not you may issue patents to the purchasers of school lands as provided by former Chapter 166, RSMo 1959.

Sections 166.130 and 166.140, RSMo 1959 provided the procedure to be followed by the Secretary of State of Missouri in issuing patents to the purchasers of school lands upon receipt of a statement showing payment of the purchase price. Chapter 166, RSMo 1959 was repealed by Laws of 1963, page 200, and no new sections have been enacted with the same or similar provisions of former Sections 166.130 and 166.140, RSMo 1959.

In the absence of any present Missouri statutes providing that he shall do so, the Secretary of State of Missouri is unauthorized to issue patents to the purchasers of school lands.

Yours very truly,

JOHN C. DANFORTH
Attorney General



January 29, 1969

Opinion No. 90
 OPINION NO. 446
 Answered by Letter -- Culver

Mr. Carl D. Gum
 Prosecuting Attorney
 Courthouse
 Harrisonville, Missouri 64701

Dear Mr. Gum:

In response to your opinion request of December 6, 1968, we enclose a copy of an opinion previously rendered by our office, May 17, 1949, to David E. Harrison, then Superintendent, Missouri State Highway Patrol.

As you will note, that opinion rather unequivocally states that under Missouri law the Highway Patrol has authority to enforce the traffic laws even on privately owned and maintained roads if they are used by the public in general. In our opinion, the cases and statutes referred to in that opinion are sound and remain controlling on this point.

It would, therefore, appear that in view of the authorities contained in the enclosed opinion, the Missouri State Highway Patrol does have authority to patrol and issue Missouri Uniform Traffic Tickets for violation of the Traffic Code on roadways in the area of Lake Winnebago which are open to and travelled by the public.

Yours very truly,

JOHN C. DANFORTH
 Attorney General

Enclosure: 5/17/49, Harrison

MS

January 8, 1969

OPINION NO. 449
Answered by Letter
Hough
OPINION NO. 92 (1969)

Honorable Robert D. Scharz
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Scharz:

By letter dated December 13, 1968, you requested an opinion as to whether documents submitted by the corporators of the Fidelity Security Life Insurance Company are in accord with the Constitution and laws of this State and of the United States.

These documents consist of the following: the Declaration of Intent of the original incorporators of the Fidelity Security Life Insurance Company, the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, as amended, and, the Publishers' Affidavit as to publication of said Articles as required by Section 376.050, RSMo 1959.

The objects and purposes of the corporation and the kinds of insurance business which it proposes to transact are set forth in Article III of the Declaration of Intention and proposed Articles of Incorporation. The company, among other things, proposes to provide contracts of indemnity against death and for weekly or other periodic indemnities for disability occasioned by accident or sickness. Section 376.010, RSMo 1959, specifically provides that "accident and health insurance shall be made a separate department of the business of the life insurance company undertaking it". Although the Declaration of Intention and proposed Articles of Incorporation are silent in regard to the requirement for a separate department as provided by Section 376.010, such statutory requirement shall apply to the proposed corporation and should be specifically brought to the attention of the corporators.

Honorable Robert D. Scharz -

An examination of the documents above referred to, pursuant to the requirements of Section 376.070, RSMo 1959, has been made. This office finds the documents to be in accord with the provisions of Chapter 376, RSMo 1959, as amended, and not inconsistent with the Constitution and laws of this State and of the United States.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

DPH:ss

SCHOOLS: 1. A school board has no authority to purchase
INSURANCE: liability insurance to cover its own negligent
actions; 2. A school board is given authority to
purchase an individual liability insurance policy on an employee
to cover his negligence occurring during the normal activities of
the school district; 3. The purchase of liability insurance by a
school board to be paid as compensation to its employees does not
waive the sovereign immunity of a school board.

Op.No. 140-1976 should always be September 9, 1969
sent with this opinion.

OPINION NO. 93

Honorable William J. Cason
State Senator - 31st District
Capitol Building
Jefferson City, Missouri 65101



Dear Senator Cason:

This letter is in response to your request for an opinion of this office in which you ask whether a school board can purchase liability insurance, and assuming a purchase by a school board does this purchase waive sovereign immunity?

We consider this as a request which asks two questions, to wit:

"May a school board purchase liability insurance covering its own negligence?

"May a school board purchase liability insurance for its employees to cover their negligence occurring during the normal activities of the school district?"

You also ask whether in the above two instances a purchase of insurance would work a waiver of sovereign immunity, or if the insurance carrier could successfully interpose the governmental immunity as a defense.

I.

The Supreme Court of Missouri has consistently stated the law to be that when suit is brought against a school board which relates to the board's negligent performance of a governmental

Honorable William J. Cason

function no cause of action is stated, Cochran v. Wilson (Mo. Sup. 1921), 229 S.W. 1050; Krueger v. Board of Education (Mo. Sup. 1925), 274 S.W. 811; Todd v. Curators of University of Missouri (Mo. Sup. 1941), 147 S.W.2d 1063; Smith v. Consolidated School District (Mo. Sup. 1966), 408 S.W.2d 50. Thus, because of the doctrine of sovereign immunity, no liability arises against a school board when it performs a governmental as opposed to a proprietary function.

As a practical matter then, a school board need not purchase liability insurance to protect itself from its negligent acts. Your question asks, however, whether a school board has the discretionary authority to purchase liability insurance to cover its negligent acts.

We feel this question has been answered negatively by the Missouri Supreme Court in Cochran v. Wilson, 229 S.W. 1050, where after a full discussion of the basis for sovereign immunity being applied to schools, the Court states, l.c. 1054-1055:

"Another equally cogent reason why the board of education cannot be required to respond to an action of the character of that at bar is the nature of the fund intrusted to its care and distribution. School funds are collected from the public to be held in trust by boards of education for a specific purpose. That purpose is education. An attempt, therefore, to otherwise apply or expend these funds is without legislative sanction and finds no favor with the courts. Cases in which hospitals have been held exempt from actions for damages for negligence on account of their character as charitable institutions may not inappropriately be cited in this connection * * * *

(citing cases)

"If it is against public policy as ruled in the foregoing cases to divert charitable funds, so called, from other than the purpose for which they have been collected how much stronger is the case where the funds are the fruit of taxation, belong to the people, and are to be used for the beneficent purpose of free education. Their immunity from the payment of damages for negligence need not rely, however, upon the analogous rule applicable to the funds of charitable

Honorable William J. Cason

institutions, but finds express approval in Freel v. School of Crawfordsville, supra, Ford v. School District, 121 PA 543, 15 Atl. 812, 1 L.R.A. 607, Wiest v. School District, 68 Or. 474, 137 Pac. 749, 49 L.R.A. (N.S.) 1026, Weddle v. School Com., 94 Md 334, 51 Atl. 289, and numerous other cases of like character." (Emphasis added)

We find no legislative enactments which have expanded the authority which a school board has over its trust funds in regard to such an expenditure since the Cochran case, and therefore conclude that a school board has no authority to purchase liability insurance to cover its own negligent acts.

II.

Because we have found that a school board may not purchase liability insurance to cover its negligent acts, your questions as to whether such a purchase would work a waiver of sovereign immunity and whether the insurance carrier could interpose the governmental immunity as an affirmative defense in a suit brought against the insurance policy become moot.

III.

A second question inherent in your letter was whether a school board may purchase liability insurance for its employees to cover their negligent acts occurring during the normal activities of the school.

By statute, school boards have the power generally to contract for the employment of teachers certified by the State Department of Education and also to contract for the employment of non-teaching personnel, to wit:

"168.101. Employment of teachers - contracts - nepotism prohibited - employment of superintendent. -- The school board, at a regular or special meeting called after the annual school meeting, may contract with and employ legally qualified teachers for and in the name of the district. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with him * * *"

Honorable William J. Cason

"168.191. Superintendent and teacher contracts in high school districts (class one counties). -- In all counties of the first class, any school board, other than boards in urban districts, in charge of a public school system maintaining a classified high school, previously approved by the state board of education, and employing a superintendent devoting his full time to supervisory and administrative work, may employ and enter into contract with a superintendent of schools for the school district for a period of not to exceed three years * * *

" * * * The school board of such high school districts may enter into contracts, for a period not to exceed two years, with school teachers, * * * "

"168.201. Superintendent and employee contracts in urban districts. -- The school board in urban districts may employ and contract with a superintendent for a term not to exceed four years from the time of making the contract, and may employ such other servants and agents as it deems necessary, and prescribe their powers, duties, compensation and term of office or employment which shall not exceed two years. It shall provide and keep a corporate seal."

"168.211 (3) * * * Subject to the approval of the board of education as to number and salaries, the superintendent may appoint as many employees as are necessary for the proper performance of his duties." (Emphasis ours)

These statutes then must form the basis from which a school board receives the authority to purchase liability insurance for its employees covering their negligence, or the reasoning implicit in Cochran will apply and deny such authority.

In each of the sections cited, it can be seen that a school board is given authority to contract for the payment of its employees' services; by Section 168.101, supra, a board is given authority to contract for a teacher's "wages"; by Section 168.191, supra, the statute merely says a school board may "contract" a superintendent, and said superintendent may "contract" teachers; by Section 168.201, supra, a school board may "contract" a superintendent and other servants and prescribe their "compensation"; by Section 168.211 (3)

Honorable William J. Cason

a school board may set the "salaries" of the employees which may be hired under this section.

It would appear then that the legislature has not attempted to limit the form the consideration for employee services is to take, but instead has given a school board the authority to contract for "wages", "salaries", and "compensation." The question then becomes, may a liability insurance policy purchased for an employee be legally considered as part of said employee's "wage", "salary", or "compensation"?

An initial question herein is whether the terms "wages", "salary", and "compensation" are interpreted under the statutes set out as being synonymous.

The Missouri courts have interpreted salary to mean compensation, State v. Farmer (Mo. Sup. 1917), 196 S.W. 1106, and also have included wages in the definition of compensation. Bovard v. Kansas City Ft. S. Ry. Co. (Mo. App. 1900), 83 Mo. App. Rep. 498, in construing statutes with wording similar to those involved herein. As the court specifically notes in Bovard, these words may by statute have different meaning:

" * * * Although wages and salary have at times a different meaning, we think that in this instance they have been used interchangeably and as meaning the same thing -- or rather that wages was intended to include salary."

We find, consistent with the foregoing authority, and from a contemporaneous reading of the statutes involved herein that the terms "wages", "salary", and "compensation" are synonymous.

Were the factual situation involved herein to arise in the private sector, it would not be unlike the payment by an employer for the premiums on an individual accident insurance policy for the benefit of his employee. In such an instance, the Internal Revenue Service considers such a payment as compensation for services under the Internal Revenue Code of 1954, 26 U.S.C.A. 61, Section 61, and thus as taxable income accruing to the employee, Rev. Rule 210, CB 1953-2, p. 114. Thus, it can be seen that the payment of insurance premiums is a common and accepted method of compensating an employee for services rendered.

It appears then that unlike the problem inherent in Cochran (lack of statutory authority to spend funds), we find that school boards have been given specific statutory authority to contract for employee services, and to tender compensation for said services; and it further appears that "compensation" is generally interpreted

Honorable William J. Cason

so as to include the purchasing of insurance for an employee. It is the conclusion of this office then that a school board is given authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district.

IV.

Your next question was whether purchase of liability insurance by a school board paid to an individual employee as compensation for services would act as a waiver of a board's sovereign immunity?

It must be remembered here, however, that in our frame of reference a school board has not purchased liability insurance on itself but has as a form of compensation for services made payment to its employees in the form of a liability insurance policy which power a board has by statute. Thus, a board has not attempted to cover its negligent liability by insurance and no waiver or estoppel problems arise.

It is the conclusion of this office then that purchase of liability insurance by a school board to be paid as compensation to its employees raises no question of waiver of sovereign immunity in light of the fact that there is no attempt made to insure against a school board's liability.

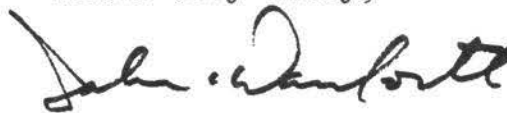
CONCLUSION

It is the conclusion of this office then that:

1. A school board has no authority to purchase liability insurance to cover its own negligent actions;
2. A school board is given authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district;
3. The purchase of liability insurance by a school board to be paid as compensation to its employees does not waive the sovereign immunity of a school board.

The foregoing opinion, which I hereby approve, has been prepared by my assistant Kenneth M. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

m2
OPINION NO. 94
Answered by Letter - Nowotny

January 31, 1969



The Honorable Thomas A. Walsh
State Representative
House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Representative Walsh:

This is in answer to your request for an opinion of this office as to whether the Labor Temple in Jefferson City is exempt from ad valorem taxation.

Enclosed is a copy of Attorney General Opinion No. 31, dated June 28, 1955, issued to the Honorable Benjamin A. Francka, holding that labor unions are not entitled to an exemption from ad valorem taxation. We still adhere to this opinion and accordingly hold that the Labor Temple in Jefferson City is not exempt from taxation.

Very truly yours,

JOHN C. DANFORTH
ATTORNEY GENERAL

Encl. Op. 31

Answer by letter-Wieler

March 5, 1969

OPINION LETTER NO. 98



Honorable Walter E. Allen
Prosecuting Attorney
Linn County
112 West Brooks
Brookfield, Missouri 64628

Dear Mr. Allen:

This is in response to your request for an opinion from this office as to whether or not the rural fire department in the Marceline area, which is incorporated as a non-profit corporation, must purchase license plates for its fire truck.

Section 301.010 (19), RSMo 1959, of the Missouri statutes on motor vehicle licensing defines "owner" to include any person, firm, corporation, or association who holds the legal title to a vehicle. Section 301.020 requires every owner of a motor vehicle, which shall be operated or driven upon the highways of the state, to apply for registration with the Office of the Director of Revenue, except as otherwise expressly provided within the chapter.

Section 301.260 (2), RSMo 1959, specifically exempts fire apparatus from the provisions of Sections 301.010 to 301.440, provided it is owned by any municipality of this state and being operated within the limits of such municipality. Therefore, in order for the Marceline area rural fire department to be exempt from the licensing provisions, it must qualify as a municipality.

It is our opinion that this non-profit corporation cannot be considered to be a municipality. It is true that the term "municipality" includes more than simply cities and towns. In *St. Louis Housing Authority v. City of St. Louis*, 239 S.W.2d 289, 294 (Mo. En Banc 1951), the term was found to include a non-profit agency which was specifically empowered by statute to exercise public and essential governmental functions. However, such is not the case

Honorable Walter E. Allen

here. This rural fire department does not operate under any such statutory authority. Rather, it is simply an organization of private citizens who have incorporated to provide for their own safety.

Therefore, it is our opinion that the rural fire department in the Marceline area will have to license its fire truck in accordance with Missouri law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

OPINION NO. 99

Answered by Letter - (Brannock)

January 10, 1969



Mr. George W. Flexsenhar, Director
Division of Industrial Inspection
Department of Labor & Industrial Relations
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Flexsenhar:

We have your request dated December 6, 1968, for an official opinion as follows:

"I received a letter from an attorney, Mr. Robert Gandal, who represents Management Recruiters, an employment agency licensed by this office. We have also licensed another employment agency by the name of Management Brokers. Both agencies operate in St. Louis.

"Mr. Gandal thinks the names are too similar. Inasmuch as we have a number of agencies licensed with similar names, I know of nothing we can do about it. However, I would appreciate receiving your thinking on the matter."

Private employment agencies are required to obtain licenses under Section 289.010, RSMo 1959, pertinent part of which is as follows:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the director of the division of industrial inspection of the state department of labor and industrial relations. Such license fee in cities of fifty thousand population and over shall be fifty dollars per annum, and in

Mr. George W. Flexsenhar

all cities containing less than fifty thousand population, a uniform fee of twenty-five dollars per annum. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency...."

We have carefully considered Chapter 289, RSMo 1959, entitled "Private Employment Agencies", and we can find no authority or duty stated in said chapter for the Division of Industrial Inspection to refuse to issue a license to operate an employment office to an applicant because of an alleged similarity between the name of such applicant and another person, firm or corporation holding a license to operate an employment agency.

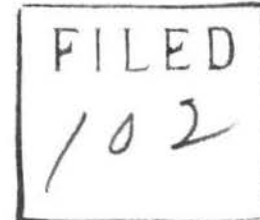
We are enclosing Opinion No. 99 rendered June 7, 1940, to the Honorable Carl F. Wymore holding that in the absence of statutory authority the Secretary of State cannot refuse to register similar or the same names under the "fictitious name" statutes. We believe the reasoning to be applicable insofar as the authority of the director of the Division of Industrial Inspection is concerned.

It is therefore the view of this office that the Division of Industrial Inspection has no duty or authority to refuse to issue a license to operate an employment office to an applicant because of an alleged similarity between the name of such applicant and another person, firm or corporation holding a license to operate an employment agency.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Encls: Op. No. 99



July 7, 1969

OPINION LETTER NO. 102

Honorable John Crow
Prosecuting Attorney
Greene County Courthouse
Springfield, Missouri 65802

Dear Mr. Crow:

This is in response to your opinion request asking whether or not a Missouri judge can extend the discharge date beyond the periods authorized by Sections 548.151, RSMo 1959, and 548.171, RSMo 1959, when the delay in receiving the Governor's warrant results from the fugitive's own action in requesting the Governor's hearing.

Section 548.151 authorizes the judge or magistrate to commit such person for a period of time not exceeding 30 days pending the issuance of the Governor's warrant and Section 548.171 permits an extension of the time of commitment in the event that such person is not arrested under the warrant of the Governor for an additional period not to exceed 60 days. The applicable Supreme Court Rules of procedure are Rules 34.02 and 34.04. The interpretation of the rules and statutes given by Christopher v. Tozer, App. 263 S.W.2d 864, and subsequently Lombardo v. Tozer, App. 264 S.W.2d 376, indicate that the detention of the person beyond those periods of time is illegal and the person is entitled to discharge regardless of the reason for delay.

Very truly yours,

JOHN C. DANFORTH
Attorney General



February 3, 1969

OPINION NO. 103
Answered by Letter
Culver

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In response to your letter of December 17, 1968, we wish to advise that in our opinion accountant firms using surnames for their titles (as in your example of "Touche, Ross, Bailey and Smart") must, under the provisions of Sections 417.200, RSMo 1959, register such titles with your office as a fictitious name, since such title is not the "true name of such person" within the meaning of the law.

Although that portion of Section 326.040, RSMo Cum. Supp. 1967, requiring accountant firms to register their fictitious names with your office, was eliminated in the 1967 amendments, we believe Section 417.200 still applies. We refer you to the discussion of registering other than "true name(s)" in our Opinion to Smart, 10/27/49, and the discussion of the meaning of the phrase "true name" in connection with insurance agencies in our Opinion to Bill, 5/2/68, both enclosed.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Opinion 83, Smart, 10/27/49
Opinion 177, Bill, 5/2/68

FILED
104

February 28, 1969

OPINION LETTER NO. 104

Honorable James F. Flynn
Representative, District 59
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Flynn:

This letter is in response to your letter of January 9, 1969, in which you ask for an opinion as to whether increased benefits may legally be paid to persons who have retired and are receiving benefits on the effective date of the increase.

This office has previously advised that retired state employees may not be given increased benefits from public funds after their retirement because to do so would constitute a grant of public money to a private person and a grant of extra compensation, in violation of Article III, Sections 38(a), 39 (3) Missouri Constitution of 1945. Attached are copies of Opinion No. 95, 5-12-61, Wellborn, and Opinion No. 39, 10-19-61, Hemphill.

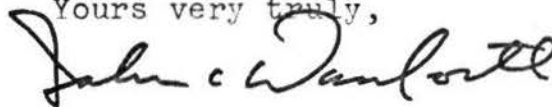
The Missouri Supreme Court, sitting en banc, held, in State ex rel. Breshears v. Missouri State Employees Retirement System, Mo., 362 S.W.2d 571 (1962), that a law increasing retirement benefits, under a system dependent upon voluntary contributions of the participants, could not apply to persons already retired. To do so, the court found, would deplete the funds previously contributed, thereby impairing contract rights vested in other members of the system.

The Breshears case also indicated that a token payment to the system by retired members would not suffice to entitle them to share in future increased benefits. To avoid constitutional objections, each contribution would have to equal the present cash value, determined on an actuarial basis, of the increase to each contributor. See 362, S.W.2d at 577.

Honorable James F. Flynn

For the above reason, the contemplated legislation to increase retirement benefits may not legally apply to persons who have retired and are receiving benefits on the effective date of the increase.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion No. 95
5-12-61, Wellborn

Opinion No. 39
10-19-61, Hemphill

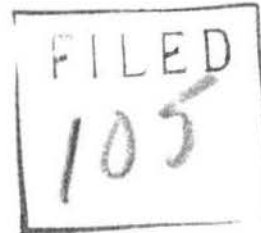
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ASSESSORS: County assessor can verify the assessor's books as
COUNTY ASSESSORS: provided by Section 137.245, R.S.Mo., when such
assessor's books have been prepared by data
processing equipment operators from information
furnished by the assessor.

OPINION NO. 105-69

February 25, 1969

Honorable John Crow
Prosecuting Attorney
of Greene County
Springfield, Missouri 65802



Dear John:

This letter is in response to your request for a legal
opinion. Your opinion request presented the following issue:

"Can the county assessor, verify by affidavit,
that the tax assessments are correctly set
forth in the tax assessor's book if he did
not personally place the information in the
tax book?"

The applicable statute is Section 137.245, R.S.Mo.,
which reads in part as follows:

"Assessor to prepare and return assessor's
book, verification - clerk to abstract -
failure, a misdemeanor.

"1. The assessor, except in St. Louis city,
shall make out and return to the county
court, on or before the thirty-first day
of May in every year, the assessor's book,
verified by his affidavit annexed thereto,
in the following words:

Honorable John Crow

. being duly sworn, makes oath and says that he has made diligent efforts to ascertain all the taxable property being or situate, on the first day of January last past, in the county of which he is assessor; that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law."

It is our understanding that the Green County assessor proposes to use data processing equipment to place the assessment information in the assessor's books. It is our further understanding that all of the property information will be gathered by the assessor and that the actual assessment will be made by the assessor. At this point the information will be supplied to data processing equipment operators and they will perform the mechanical function of sorting the information and transferring it to the tax books with no right to change the information provided by the assessor.

The general rule governing a public official's right to delegate his office's responsibility is stated in 51 Am Jur., Taxation, Section 664, page 626 as follows:

" * * * However, while the assessment of a tax must be the act of the person chosen to act as assessor, it is not required that the officer personally perform every act connected with the assessment and the making of the tax role; many of these acts are of a ministerial or clerical nature, involving no exercise or discretion, and having no relation to any right of the taxpayer, and such as these the assessor may lawfully delegate unless forbidden by statute to do so. Among these are transcribing upon the rolls the various assessments and calculating the amounts of taxes levied thereon; entering in assessment books the list of names and the descriptions of taxable property; listing of property on the assessment roll, etc. * * * "

Honorable John Crow

This general rule has been recognized by the Missouri courts in Parker-Washington Company vs. Cecil, 208 Mo. App. 496, 236 SW 1100; State ex rel Skrainka Construction Company vs. Reber, 226 Mo. 229, 126 SW 397; and Jaicks vs. Merrill, 201 Mo. 91, 98 SW 753.

In State vs. Reber, supra, the court stated:

"An officer to whom a discretion is intrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion."

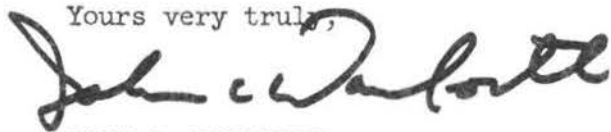
It appears that the acts to be performed by the data processing equipment operators are ministerial in nature and under the Missouri law can be properly delegated. It also seems clear that if the assessor has performed his statutory functions and merely provides the operators with all the information that will be used in compiling the assessor's books that the assessor can verify said books.

CONCLUSION

Therefore, it is the opinion of this office that the county assessor can verify the assessor's books as provided by Section 137.245, R.S.Mo., when such assessor's books have been prepared by data processing equipment operators from information furnished by the assessor.

The foregoing opinion, which I hereby approve, has been prepared by my assistant, Alfred C. Sikes.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CIRCUIT CLERK:
JUVENILE COURT:
JUVENILE CLERK:
COMPENSATION:

The circuit clerk of a second class county is not entitled to any fee or salary other than his regular salary for acting as clerk of the juvenile court.

June 19, 1969

OPINION NO. 106

Honorable Arlie H. Meyer
State Representative
Room #235 - 105th District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Meyer:

This is in response to your recent request for an opinion which states:

"I am enclosing copies of statutes #211.311, #211.351 and #211.391. My question is 'is the Circuit Clerk of a second class county entitled to any fee or salary other than his regular salary if acting as clerk of the juvenile causes in his office?'"

As background for the discussion of this question it should be noted that the Juvenile Court, for which Section 211.311, RSMo 1959, requires the clerk of the Circuit Court to act as clerk, is not a separate court, but is the Circuit Court or Court of Common Pleas acting with reference to juvenile cases.

Section 211.021, RSMo 1959, provides in part as follows:

"As used in sections 211.011 to 211.431, unless the context clearly requires otherwise: (3)'Juvenile Court' means the Cape Girardeau court of common pleas and the circuit court of each county, except that in the judicial circuits having more than one judge, the term means the juvenile division of the circuit court of the county; * * *" See also Section 28 of Article V of the Constitution of Missouri.

Therefore, it may not be stated that the clerk when acting in juvenile causes is acting in the capacity of a separate office.

The statutory provisions for compensation of circuit clerks in second class counties do not refer to added compensation for serving as clerk in juvenile causes but do refer to additional compensation for other activities. Section 483.315, RSMo 1959, provides:

"The clerk of the circuit court of all counties of the second class shall receive as compensation for his services six thousand seven hundred dollars per annum to be paid in twelve equal monthly installments by the county as warrants drawn on the county treasury. In addition to the annual salary, he may retain all fees earned by him

Honorable Arlie H. Meyer

in case of change of venue from other counties."

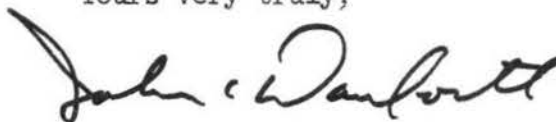
Additional compensation is also referred to in such matters as reports of case loads to the county court, Section 483.317, RSMo Supp. 1967; acting as member of the jury commission board, Section 495.050, RSMo Supp. 1967. The reference in other places to added compensation for performing certain functions clearly demonstrates that for acting in juvenile causes, in the case of the clerk in a second class county, when no mention is made of added compensation, there is no entitlement to it. The reference in Section 211.391, RSMo Supp. 1967, which you cite, to compensation of juvenile court personnel including clerks and typists does not authorize additional compensation for the clerk of the circuit court acting in juvenile causes. It is clear that the reference to "clerks" in Section 211.391 is to additional clerks necessary to conduct juvenile court proceedings and does not refer to the circuit clerk who by statute is designated as the clerk of the Juvenile Court.

CONCLUSION

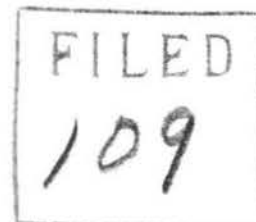
It is, therefore, the opinion of this office that the circuit clerk of a second class county is not entitled to any fee or salary other than his regular salary for acting as clerk of the juvenile court.

This opinion, which I hereby approve, was prepared by my Special Assistant Richard C. Hudson.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General



Answer by letter-Mansur

2/18/69

OPINION LETTER NO. 109

Honorable William T. Brooking, Jr.
Assistant Prosecuting Attorney
Jefferson County Court House
Hillsboro, Missouri 63050

Dear Mr. Brooking:

On January 17, 1969, you requested an official opinion from this office as follows:

"The County Court of Jefferson County, Mo., is desirous of setting up a Retirement System and Pension plan starting February 1, 1969. In connection with such a plan they are considering following Statute 70.605, which permits any political subdivision of the State to set up a retirement and pension plan, however, in studying this matter, Statute 67.200 concerning pension plans apparently exempts Jefferson County from a pension plan.

"It is requested that a written Opinion be furnished to this office as to whether or not Jefferson County can set up its own retirement system and pension plan in view of Section 67.200."

Jefferson County has an assessed valuation of \$40,000,000 or more and a population in excess of 65,000 and adjoins a county of the first class with a charter form of government.

Section 70.600 to and including Section 70.760, RSMo Supp 1967, provides for the establishment of a retirement and pensioning system for officers and employees of political subdivisions. This system is known as the "Missouri Local Government Employees' Retirement System."

Honorable William T. Brooking, Jr.

Section 70.605, RSMo Supp. 1967, provides in part:

"1. For the purpose of providing for the retirement or pensioning of the officers and employees and the widows and children of deceased officers and employees of any political subdivision of the state, there is hereby created and established a retirement system which shall be a body corporate, which shall be under the management of a board of trustees herein described, and shall be known as the 'Missouri Local Government Employees' Retirement System'. Such system may sue and be sued, transact business, invest funds, and hold cash, securities, and other property. The system shall begin operations on the first day of the calendar month next following sixty days after the date the board of trustees has received certification from ten political subdivisions that they have elected to become employers."

Section 70.600, subdivision 19, RSMo Supp. 1967, provides:

"'Political subdivision', any governmental subdivision of this state created pursuant to the laws of this state, and having the power to tax, except public school districts;"

Jefferson County is a political subdivision within the terms of Section 70.600 (19) and may elect to provide for the system of retirement and pensioning of its officers and employees under the Missouri Local Government Employees' Retirement System by a majority vote of its governing body under provisions of Section 70.610, RSMo Supp. 1967, unless it is otherwise prohibited by law.

Section 67.200, RSMo Supp. 1967, provides:

"1. Any political corporation or subdivision of this state, now having or which may hereafter have an assessed valuation of forty million dollars or more, except counties of the second class having a population in excess of sixty-five thousand, which adjoins a county of the first class with a charter form of government, which does not now have a pension system for its officers and employees adopted pursuant to state law, may provide by proper legislative action of its governing body for the pensioning of its officers and employees and the widows and minor children

Honorable William T. Brooking, Jr.

of deceased officers and employees and to appropriate and utilize its revenues and other available funds for such purposes.

"2. In adopting a pension plan such counties, other political corporations or political subdivisions may provide for different benefits and requirements for elected officers and appointed officers and employees."

Since Jefferson County has a population which exceeds 65,000 and an assessed valuation in excess of \$40,000,000 and adjoins a county of the first class with a charter form of government, it is exempted from the provisions of Section 67.200.

The statutes providing for the establishment of the Missouri Local Government Employees' Retirement System are general statutes that apply to all political subdivisions of the state having the power to tax except public school districts. Section 67.200, supra, is a special statute that applies only to certain political corporations or subdivisions of the state that have an assessed valuation in excess of \$40,000,000 and do not have a pensioning system for their officers and employees adopted pursuant to state law. These statutes are not inconsistent or in conflict with the other because they apply to different subjects. In order that there be a conflict between two laws, both must contain either express or implied provisions which are inconsistent and irreconcilable with each other, and when either is silent, where the other speaks, there can be no conflict between them. *Manker vs. Faulhaber*, 94 Mo. 430; *City of St. Louis vs. Klausmeier*, 213 Mo. 119, 112 S.W. 516; *City of St. Louis vs. Union Dairy Co.*, 213 Mo. 148, 112 S.W. 525.

It is the opinion of this department that Jefferson County is exempted from the provisions of Section 67.200, supra. However, Jefferson County may provide for the retirement and pensioning of its officers and employees under the Missouri Local Government Employees' Retirement System.

Yours very truly,

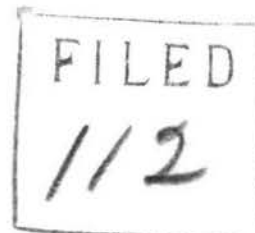
JOHN C. DANFORTH
Attorney General

FEES AND SALARIES:
TOWNSHIPS:
COMPENSATION AND SALARIES:
TOWNSHIP TREASURER:

Section 65.230(2), RSMo 1959, authorizes compensation to a township treasurer of two per cent on all funds handled by him up to the amount of \$1,000.00, and one per cent on all funds in excess of such amount. He is not entitled to receive two per cent on funds received by him, and another two per cent for disbursing the same funds.

February 11, 1969

Opinion No. 112



Mr. Jack Lukehart
Prosecuting Attorney
Chariton County
Keytesville, Missouri 65261

Dear Mr. Lukehart:

This official opinion is in response to your inquiry as to the proper compensation of a township trustee in his capacity as ex officio treasurer.

The statute which you ask us to construe is as follows:

"The township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as ex officio treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over this amount." (§65.230(2), RSMo 1959).

Your specific question is whether the treasurer may receive two per cent for receiving and disbursing, or two per cent for receiving, and two per cent for disbursing the funds. The former construction renders the word "and" in the phrase "receiving and disbursing" conjunctive, and the latter construction renders it disjunctive.

"While the word 'and' is ordinarily used in a statute, and is so considered by the courts, as a conjunctive, conjunctive words of such nature may

Mr. Jack Lukehart

sometimes be construed as disjunctive, unless such construction violates the intention of the legislature. This construction is never resorted to except for strong reasons and unless the context favors the conversion...." (82 CJS Statutes, §335, pp. 673-674).

Numerous Missouri cases have held that statutes relating to the compensation of public officers must be strictly construed in favor of the government and that an officer is entitled only to that which is clearly given. *Becker v. St. Francois County*, 421 S.W. 2d 779, 783 (Div. 1, 1967); *Felker v. Carpenter*, 340 S.W.2d 696, 701 (Div. 1, 1960); *Ward v. Christian County*, 111 S.W.2d 182, 183 (Div. 1, 1937); *Holman v. City of Macon*, 137 S.W. 16, 17 (K.C. App., 1911); *State ex rel. Linn County v. Adams*, 72 S.W. 655, 656 (Div. 1, 1903); *State ex rel. Troll v. Brown*, 47 S.W. 504, 505 (Div. 2, 1898); *State ex rel. Stewart v. Wofford*, 22 S.W. 486, 487 (Div. 2, 1893).

Furthermore, it has been held that a municipal officer claiming a salary of a given amount must point to the provision of the laws which with certainty and beyond doubt authorizes it, and in case of doubt as between the municipal corporation and its officer, a statute or ordinance fixing the compensation is to be construed so as to protect the municipal treasury. *Nodaway County v. Kidder*, 129 S.W.2d 857, 860 (Div. 1, 1939).

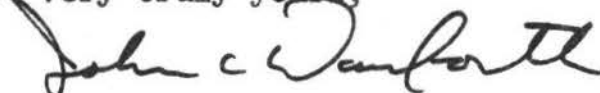
In light of the foregoing, it is our opinion that the statute authorizes compensation to the township treasurer of two per cent on all funds handled by him up to \$1,000.00, and one per cent on all funds in excess of \$1,000.00.

CONCLUSION

Therefore, it is the opinion of this office that Section 65.230(2), RSMo 1959, authorizes compensation to a township treasurer of two per cent on all funds handled by him up to the amount of \$1,000.00, and one per cent on all funds in excess of such amount. He is not entitled to receive two per cent on funds received by him, and another two per cent for disbursing the same funds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Lauren R. Wood.

Very truly yours,



JOHN C. DANFORTH
Attorney General



2/28/69

Opinion No. 113-69
Answered by Letter

Honorable Arlie H. Meyer
State Representative
District No. 105
House of Representatives
Jefferson City, Missouri 65101

Dear Representative Meyer:

This is answer to your letter dated January 22, 1969, in which you requested an official opinion from this office. The opinion is directed to the specific question you asked, to wit:

"Do the provisions of the Motor Vehicle Safety Inspection Law require that a Mobile Home, as hereinafter described, be inspected and an official certificate of inspection and approval obtained as a condition to registration thereof under the Motor Vehicle Registration Laws of this state?"

The types of vehicles subject to the Motor Vehicle Safety Inspection Law are particularized in Section 304.700, RSMo Cum. Supp. 1967, in pertinent part as follows:

"All owners of motor vehicles and trailers are defined in section 301.010, RSMo which are required to be registered in this state, except trailers registered for a gross weight of three thousand pounds or less, and also except historic motor vehicles registered under section 301.131, RSMo must submit their motor vehicles and trailers to an annual inspection of their mechanisms and equipment in accordance with the provisions of sections 304.700 to 304.780 and obtain a certificate of inspection and a duplicate thereof from a duly authorized official inspection station."
(Emphasis added)

Honorable Arlie H. Meyer

Thus, it can be seen that motor vehicles and trailers which are required to be registered must submit to an annual inspection. The amplification of what type of vehicles must be registered in Missouri is to be found by referring to Section 301.020, RSMo 1959:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose " (Emphasis added)

This section, then, holds that motor vehicles or trailers of more than three thousand pounds that are to operated or driven on Missouri highways must be registered; and thus as your letter indicates, a determination of whether a mobile home falls within the definition of the statutory term "trailer" must be made.

Section 301.010(27) RSMo 1959, defines trailer as follows:

"Trailer, any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by a self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle;"

While "mobile home" per se is not referred to in the section, an opinion of this office has held (Opinion No. 211, Waggoner, 9/5/63, a copy of which is enclosed) that a mobile home or house trailer falls within the statutory definition of "trailer".

From the foregoing authority then, it can be seen that a mobile home must be registered before it may operate on the highways of Missouri.

As a prerequisite to registration of a "trailer", Section 304.710, RSMo Cum. Supp. 1967, in pertinent part states the following:

"No state registration license to operate in this state any motor vehicle or trailer

Honorable Arlie H. Meyer

as defined in section 301.010, RSMo, except trailers registered for a gross weight of three thousand pounds or less and historic motor vehicles registered under the provisions of Section 301.131, RSMo, may be issued unless the application for license is accompanied by the duplicate of a certificate of inspection and approval issued not more than thirty days prior to the date of the application, or, in the case of school buses, the duplicate of a certificate of inspection and approval issued at the time provided in section 304.750 next preceding the date of application * * *
(Emphasis added)

This section affirmatively states that a duplicate of a certificate of inspection must be presented before a registration license to operate may be issued. This requirement then compels that a mobile home have an official certificate of inspection before it may be registered to operate on the highways of Missouri.

The provisions of the Motor Vehicle Safety Inspection Law require that a mobile home of more than three thousand pounds be inspected and an official certificate of inspection and approval obtained as a condition to registration thereof under the Motor Vehicle Registration Laws of this state.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc. Opinion No. 211
Waggoner, 9/5/63

ASSESSMENTS:
CITIES, TOWNS & VILLAGES:
SCHOOLS:
COOPERATIVE AGREEMENTS:

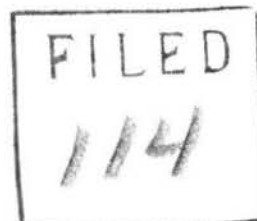
1. The St. Joseph School District does not have authority to expend its funds to contract with a professional firm to reevaluate real property within its boundaries. 2. The St. Joseph School District does not have the authority to enter into a cooperative agreement with the City of St. Joseph and Buchanan County in

undertaking reevaluation of real property which is a common source of revenue to all three. 3. The county of Buchanan has the authority to contract with a private professional firm to undertake the reevaluation of real property within the County as a means of assisting the Assessor, and authority to enter into a cooperative agreement with the City of St. Joseph, but not with the St. Joseph School District. 4. Such a contract with a private professional firm may be financed with funds from general revenue, if available; a levy approved by the voters under section 137.073, RSMo Supp. 1967, is not mandatory. If a levy is approved as provided in Section 137.037, such levy must be included in the general levy for county purposes provided in section 11b of Article X of the Constitution of Missouri.

OPINION NO. 114

September 23, 1969

Honorable Ronald Reed, Jr.
State Representative
81st District
2602 Francis Street
St. Joseph, Missouri 64501



Dear Representative Reed:

This is in response to your request for an opinion dated January 20, 1969, in which you ask the following questions:

1. Does the St. Joseph School District have the authority to expend its funds to contract with a private professional firm to reevaluate real property within its boundaries?
2. Does the St. Joseph School District have the authority to enter into a cooperative agreement with the City of St. Joseph and the County of Buchanan in undertaking the reevaluation of real property which is a common source of revenue to all three?
3. Does the County of Buchanan have the authority to contract with a private professional firm to undertake the reevaluation of real property within the county and authority to enter into a cooperative agreement for such purposes with the St. Joseph School District and the City of St. Joseph?
4. If the County of Buchanan has authority to enter into a contract as set out in paragraph 3, can it be financed with funds from general revenue or is a levy approved by the

Honorable Ronald Reed, Jr.

voters mandatory in order to finance such a reevaluation?

As to Question 1, you have noted in your enclosed memorandum that there is no specific reference in Chapter 164, RSMo 1959, concerning tax levies by school districts, to authority in school districts to spend money on real property evaluation; no such reference has been discovered by this office there or in any other place. Considering the generally applied rule of interpretation, that school districts are limited to those powers expressly conferred by statute, or necessarily implied from those conferred or from duties imposed by statute (C.J.S. Schools and School Districts, § § 119, 277; Wright v. St. Louis Board of Education, 246 SW 43 (Mo. Sup. 1922); Cape Girardeau School District v. Frye, 225 SW 2d 484 (St. L. App. 1949)), there is not sufficient reason to imply any authority to use its funds to reevaluate property or to contract for such a purpose with a private firm. Assessment, valuation of property, as to school taxes, is a function of the County Assessor. See Chapter 137, RSMo 1959, and the reference in section 164.041, RSMo Supp. 1967, that: "the county clerk shall proceed to assess the amount so returned (estimates of school districts revenue needs) against all taxable property in each district, as shown by the last annual assessment for state and county purposes."

As to Question 2, the answer clearly is that the St. Joseph School District does not have the authority to enter into a cooperative agreement with the City of St. Joseph and the County of Buchanan in undertaking the reevaluation of real property because it is not "within the scope of the powers of such municipality and political subdivision," as required by section 70.220, RSMo 1959, which is the authorizing statute for such agreements. That the project of reevaluation of real property is not within the power of the school district is discussed in the prior paragraph.

Your question three raises first the question if Buchanan County has the authority to contract with a private professional firm to undertake the reevaluation of real property and second whether it has authority to enter into a cooperative agreement for such purposes with the St. Joseph School District and the City of St. Joseph. Authority for the conclusion that Buchanan County has the authority to contract with a private professional firm to undertake the reevaluation of real property within the county for the purpose of aiding the county assessor in securing full and accurate assessment of all taxable property is found in section 137.230(2), RSMo Supp. 1967, which provides that:

"In all counties the county court may, in addition to the foregoing, provide for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered or record, adopt for the whole or any designated by order entered or record, adopt for the whole or any designated part of the county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in the county or designated part thereof or otherwise and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury.

This particular section was cited by the Missouri Supreme Court in Hellman

Honorable Ronald Reed, Jr.

v. St. Louis County 302 SW 2d 911(1957), an action by a resident taxpayer against the County and others to enjoin enforcement of an allegedly illegal contract entered into between the court and two appraisal companies for appraisal of property in connection with ultimate appraisal of real property for taxation purposes, and was considered by the court to be authority for such a contract, even considering the rule that the county court had only such authority as expressly granted or necessarily implied; the court considered there was no delegation of authority of the assessor to others by these contracts which were to assist the assessor. Alternatively the court did state that, for a Home Rule Charter County, the statute was a declaration that such a procedure was not contrary to public policy and that the procedure could be, and was, authorized by the County Charter and ordinances. This office has previously concluded and still concludes that the procedure adopted and approved in the Hellman case was not dependent upon the added authority of the provisions of the County Charter (Op. Atty. Gen., Dalton, 10-4-61; Collins, 11-13-63).

Another aspect of your question 3 concerns the authority to enter into a cooperative agreement with the City of St. Joseph and the St. Joseph School District. The lack of authority of the School District in this area is referred to above. The authority of the City of St. Joseph is a different problem. Inasmuch as the City is a Constitutional Charter City, reference should be made to the City Charter. The City Charter contains the following provisions pertinent to this particular problem:

Section 1.3 POWERS OF THE CITY. The City shall have all powers of local self-government and home rule under the Constitution and laws of Missouri, and such powers as the legislature may be competent to grant; except as prohibited by the Constitution or laws of the State, the City may exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever. Such powers shall be exercised in the manner prescribed in this charter, or, if not prescribed herein, in such manner as may be prescribed by ordinance of the Council.

Section 2.13 POWERS. Without limitation of the powers conferred upon the City by Section 1.3 of Article I of this charter, or by any other provision hereof, the Council shall have power by ordinance not inconsistent with this Charter to do, but shall not be restricted to, the following:

(1) Assess, levy and collect taxes for all general and special purposes on all subjects or objects of taxation not expressly prohibited by law; provide for enforcing the prompt payment and for penalties for delinquency thereof; and adopt such classifications of the subjects and objects of taxation as may not be contrary to law.

(25) Contract and be contracted with, and sue and be sued.

(29) Enact, adopt, and enforce all ordinances, rules and regulations; do all things, and exercise all governmental and municipal authority necessary, needful, and convenient, contributing to or bearing a substantial relation to the full and complete exercise of all the powers in this charter enumerated.

(3) Co-operate, or join by contract or otherwise, with other cities, with counties, states, the United States, or other governmental bodies, singly or jointly or in districts or associations for promoting or carrying out any of the powers of the City, or for the acquisition, construction or operation of any property, works, plants or structures convenient or necessary for carrying out any of the purposes or objects authorized by this charter.

Section 6.2 (13) (The Director of Finance Shall) Assess, or cause to be assessed, on a just and equitable basis, and as provided by law, all taxable property in such manner and within such time as the Council may prescribe.

Section 6.15 ASSESSMENT, LEVY AND COLLECTION OF TAXES. The Council shall, by ordinance, provide for the assessment, levy and collection of all general and special taxes; provide for the enforcement of the prompt payment of the same; provide penalties for the delinquency thereof; provide for the collection of delinquent taxes on real or personal property by the sale of such property by the City or by suit instituted by the City; prescribe the procedure at such sales and provide that the City may become the purchaser at such sale.

The broad grant of authority contained in these sections clearly authorizes contracting with a private professional firm to undertake the reevaluation. Especial attention is invited to the provisions of Section 6.2 (13) that the Director of Finance is to assess or caused to be assessed, on a just and equitable basis, and as provided by law in such manner as the Council may prescribe. This language is comparable to the language referred to in the Hellman case above, in the County Charter, "to provide for assessment, levy, equalization, and collection of all taxes now and hereafter authorized by Constitution or the law and to prescribe a method or system to facilitate the assessment, calculation, extension, and collection of taxes", as sufficient to authorize such a contract. The words, caused to be assessed, just and equitable, and in such manner, clearly give a broad authority to contract with a professional firm to aid in the assessment process.

Section 70.220, RSMo. 1959, implementing section 16, Article VI of the Constitution of Missouri authorizing political subdivisions to cooperate with other subdivisions for any "common service" then clearly authorizes the city and the county which have been shown to have the authority to contract individually, to cooperate in the project with a private firm, the City's part to be concerned with valuation of property in the city. A broad interpretation of this section was suggested in School District of Kansas City v. Kansas City, Mo., 382 S.W.2d 688 (Mo. Sup. 1964). Additionally it should be noted that section 70.220 also contains authorization to "contract" with any "private person, firm, association or corporation for the planning, development, evaluation, acquisition or operation of any public improvement facility, or for a common service." Although this portion is not cited as principal support for the conclusion of authority to contract with private firms to provide a service, it at least suggest that the legislature contemplated under some circumstances the employment of private firms to assist in providing a necessary public service.

Honorable Ronald Reed, Jr.

In your fourth question you ask whether the contract for reevaluation of property can be financed by funds from general revenue or whether a levy must be approved by a majority vote under Section 137.037 before the reevaluation can be made. Section 137.037, RSMo Supp. 1967 provides in part as follows:

"The county court of any county may, at any general election, submit to the qualified voters of the county a proposition to authorize a levy not to exceed two mills on the dollar of assessed valuation of all tangible property taxable by the county for one year to pay the cost of contracting with a private person or firm to reevaluate all real property subject to taxation by that county; provided, however, that the governing body of counties of the first class may by order of record require such reevaluation to be made by the county assessor of such county and may use said revenue to provide necessary additional employees, office equipment and supplies in the office of the county assessor for such purpose only.

* * * * *

If the proposition receives a majority of the votes cast thereon, the county court shall impose such levy for one year. Any excess collected in the last year in which the levy is imposed shall be transferred to the general revenue fund of the county."

It is our view that the cost of reevaluation is to be paid out of general revenue whether an election is held under Section 137.037 or not.

If an election is held and a majority vote is received, the levy authorized to be used for reevaluation purposes forms a part of the general levy for county purposes. The effect of the vote is to make certain that the funds derived from the tax levy authorized for one year shall be used only for property reevaluation purposes.

Section 11(b) of Article X of the Constitution of Missouri provides that the maximum tax rate to be levied by counties is as follows:

"For counties--thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;
* * *"

Section 11 (c) of Article X of the Constitution of Missouri provides that such tax rates may be increased for county purposes only by a two-thirds vote.

If it were held that Section 137.037 authorizes a levy in addition to the constitutional limit on taxes for county purposes such section would be unconstitutional because Section 137.037 purports to authorize an increase above the constitutional limit by a majority vote whereas the Constitution requires a two-thirds vote in order to authorize a tax levy above constitutional limitation.

Honorable Ronald Reed, Jr.

However, it is our view that Section 137.037 does not purport to provide for a tax levy above the constitutional limit but provides that the county court must in the year such levy is voted expend the funds received from such levy for reevaluation purposes but the levy authorized by Section 137.037 is included within the maximum levy authorized for county purposes.

In a county with less than three hundred million dollars property valuation in a year in which the county court determines that a twenty-cent levy is necessary for county purposes and the people vote a levy of twenty cents for one year under Section 137.037 the court would be compelled to levy such additional twenty cents for one year so that the total levy for county purposes including reevaluation of property for such year would be fifty cents.

In no event could the county court in such county levy more than fifty cents without a two-thirds vote of the people and if a fifty-cent levy were made in the year in which a twenty-cent levy was authorized for reevaluation under Section 137.037, only thirty cents of the fifty-cent levy could be used for other county purposes.

However, we believe it to be clear that the county court can without a vote under Section 137.037 expend funds derived from the general tax levy for county purposes for reevaluation purposes.

The provisions of Section 137.230 (2) quoted supra clearly provide that the county court can enter into a contract for a reevaluation of property and provide the payment for such reevaluation can be made out of county general revenue.

There is no language in Section 137.037 that in anyway purports specifically or impliedly to repeal Section 137.230 (2) or to make the procedure to be followed under Section 137.037 the only or exclusive method to be followed in reevaluation of property. Therefore, the county court has power and authority without a vote under Section 137.037 if funds are available to enter into a contract for reevaluation of property under Section 137.037 (2) the cost to be paid out of county general revenue.

CONCLUSION

It is the opinion of this office that:

1. The St. Joseph School District does not have authority to expend its funds to contract with a professional firm to reevaluate real property within its boundaries.
2. The St. Joseph School District does not have the authority to enter into a cooperative agreement with the City of St. Joseph and Buchanan County in undertaking reevaluation of real property which is a common source of revenue to all three.
3. The County of Buchanan has the authority to contract with a private professional firm to undertake the reevaluation of real property within the County as a means of assisting the Assessor, and authority to enter into a cooperative agreement with the City of St. Joseph, but not with the St. Joseph School District.

Honorable Ronald Reed, Jr.

4. Such a contract with a private professional firm may be financed with funds from general revenue, if available; a levy approved by the voters under Section 137.037, RSMo Supp. 1967 is not mandatory. If a levy is approved as provided in Section 137.037 such levy must be included in the general levy for county purposes provided in Section 11 (b) of Art. X of the Constitution of Missouri.

Yours very truly,

A handwritten signature in black ink, reading "John C. Danforth". The signature is written in a cursive style with a large, stylized "J" and "D".

JOHN C. DANFORTH
Attorney General

COUNTIES:
COUNTY COURT:
TAXATION:
BONDS:

A county court is authorized to expend such amount of tax revenues raised to create a bond service fund for the county's unissued hospital bonds as is needed to pay obligations

incurred in furtherance of the purpose for which the bonds were authorized. Tax proceeds so expended must be replaced as soon as the hospital bonds are issued. A county court is authorized to replace these bonds with the bond proceeds.

OPINION NO. 115

August 14, 1969

Honorable Franklin D. Holder
Prosecuting Attorney
Court House
Dunklin County
Kennett, Missouri 63857



Dear Mr. Holder:

This opinion is in response to your letter of recent date in which you request an official opinion from this office on the following question:

May tax proceeds collected for the payment of the principal of and the interest on bonds authorized but not yet issued to finance a county hospital be drawn upon by the County Court to pay architect and consultant fees incurred in connection with the planning of the hospital and then replaced by proceeds of said bonds when they are issued?

Two distinct questions are raised by your request: (1) Whether proceeds from the taxation of tangible property in Dunklin County intended for the payment of the interest on and the principal of bond indebtedness may be used temporarily to satisfy obligations of the county in furtherance of the project for which the bonds were authorized, and (2) Whether proceeds from the bonds when sold may be channeled into the county's bond service fund to replace any tax proceeds previously used to meet these obligations.

Section 108.180, RSMo 1959, directs in pertinent part:

Honorable Franklin D. Holder

"When any bonds shall have been issued by any county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, as provided under the constitution and laws of this state for the incurring of indebtedness, or for refunding, extending, unifying the whole or any part of their valid bonded indebtedness, the proceeds from the sale thereof and all moneys derived by tax levy, or otherwise, for interest and sinking fund provided for the payment of such bonds, shall be kept separate and apart from all other funds of such governmental unit, so that there shall be no commingling of such funds with any other funds of such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state; provided, that in no case shall the proceeds derived from the sale of any such bonds be used for any purpose other than that for which such bonds were issued, nor shall such interest and sinking fund be used for any purpose other than to meet the interest and principal of such bonds; . . ."

One obvious purpose of this statute is to assure purchasers of bonds of political subdivisions of the state that interest and principal will be paid when due. The condition in the statute, "When any bonds shall have been issued. . .", is in accord with this purpose, for if there are no bondholders there can be no need for such assurances. In the case posed, the bonds have been authorized but not issued and, therefore, the command of Section 108.180, RSMo, that a fund be created solely for the purpose of paying the interest on and the principal of bonded indebtedness is not operative here.

It is the opinion of this office that the tax proceeds involved are still general proceeds of the county and may be used for the purpose of paying the architect and consultant's fees if they were properly incurred. It is clear that any obligations of a political subdivision which may be met through the proceeds of bonded indebtedness may be met as well out of general revenues. See *Mississippi County vs. Jackson*, 51 Mo. 23 (1872).

It should be noted, however, that upon the issuance of the bonds in question, the tax proceeds here involved must, pursuant to the command of Section 108.180, RSMo, be segregated as a bond service fund. The tax proceeds previously used to pay obligations incurred

Honorable Franklin D. Holder

in furtherance of the purpose for which the bonds were authorized must be immediately replaced to insure payment of all interest on and principal of the bonds when due.

This leads to consideration of the question whether proceeds from the sale of the bonds may be directed into the bond service fund to replace those tax proceeds used to pay the architect and consultant's fees. Section 108.180 directs that, ". . .in no case shall the proceeds derived from the sale of any such bonds be used for any purpose other than that for which such bonds were issued, . . ."

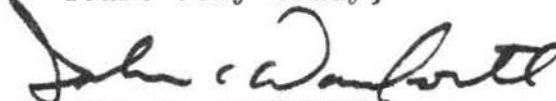
In permitting the County Court to channel bond proceeds into the bond service fund, the intention of the legislature to prevent the diversion of bond proceeds is clearly served, though indirectly. Whatever bond proceeds are directed into the bond service fund would have been applied to the payment of the architect and consultant's fees directly. It should make no difference then that these bond proceeds are used instead to replace tax proceeds which have been so applied, and it is the opinion of this office that bond proceeds are used for the purposes for which the bonds are issued when they are channeled into a bond service fund to replace tax proceeds applied as previously stated.

CONCLUSION

The Dunklin County Court is authorized to expend such amount of tax revenues raised to create a fund to pay the interest on and the principal of the county's unissued hospital bonds as is needed to pay architect and consultant's fees properly incurred in furtherance of the purpose for which the bonds were authorized. However, the tax proceeds so expended must be replaced as soon as the hospital bonds are issued. The Dunklin County Court is further authorized to replace these proceeds with proceeds obtained from the issuance of the hospital bonds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey L. Zuckman.

Yours very truly,



JOHN C. DANFORTH
Attorney General

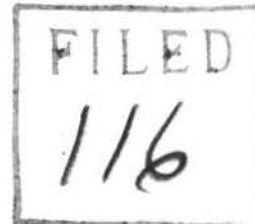
LOBBYIST:
LOBBYING:
LEGISLATION:

The financial reports required by Section 105.470, RSMo Supp 1967, should disclose all expenditures made to, or in behalf of, a member of the General Assembly for the purposes of attempting to influence the passage or defeat of legislation by the General Assembly. It is further the opinion of this office that such financial reports need not include the amounts received by persons to be used by them for the purpose of attempting to influence the passage or defeat of legislation by the General Assembly, but need only list the actual expenditures made by these persons for the stated purpose. The salaries of these persons need not be reported.

OPINION NO. 116

May 29, 1969

Honorable R. J. King, Jr.
Republican Floor Leader
Missouri House of Representatives
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative King:

This is in response to your request for an opinion on certain questions pertaining to the following statute:

"1. Any person who engages himself for pay or for any valuable consideration for the purpose of attempting to influence the passage or defeat of any legislation by the general assembly of Missouri or who expends money for such purposes shall, before doing anything in furtherance of the object, register with the chief clerk of the house of representatives and the secretary of the senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, and the duration of the employment. Each person so registering shall, within ten days after each regular or special session of the general assembly, file with the chief clerk and secretary a detailed report

Honorable R. J. King, Jr.

under oath of all money expended by him during the session just closed in carrying on his work; to whom paid; for what purposes; and the names of any paper, periodicals, magazines, or other publications in which he has caused to be published any articles, advertisements or editorials; and the proposed legislation he is employed to support or oppose. No state officer, or member of the general assembly shall be required to register under this section because of his lawful attempts to influence the passage or defeat of legislation solely in the course of his official duties. Each person so registering shall, within thirty days after the convening of any regular session, file with the chief clerk of the house and secretary of the senate a detailed report under oath of all money expended by him in carrying on his duties as such registered agent from the day the [previous?] regular session closes until the convening of the next [current?] regular session. This report shall indicate to whom the money was paid; for what purposes; and the names of any papers, periodicals, magazines or other publications in which he has caused to be published any articles, advertisements or editorials; and the proposed legislation he is employed to support or oppose.

"2. All information required to be filed under the provisions of this section with the chief clerk of the house of representatives and the secretary of the senate shall be kept available by them at all times open to public inspection until the convening of the next regular session of the general assembly.

"3. Any person failing to comply with the provisions of this section shall, upon conviction, be adjudged guilty of a misdemeanor and be subject to a fine of not more than five hundred dollars or confinement in the county jail for not more than one year or both."

Section 105.470, RSMo Supp. 1967.

Your questions are:

(1) What kind of expenditure report is required of lobbyists who are employed by business,

Honorable R. J. King, Jr.

professional, labor, or farm organizations or associations and who are employed on a full time basis to perform a multitude of services with actual lobbying varying from a minor to a major part of their activities?

(2) What kind of expenditure report is required of lobbyists who are employed personally to represent one company or group on a temporary basis during the legislative session?

(3) Are lobbyists required to segregate and file only the amounts spent while they are attempting to directly influence a specific bill or bills, or are they required to file a detailed copy of the total expenditures of their organizations when it might be said that anything they do may ultimately influence the passage or defeat of legislation?

(4) Are lobbyists required to prorate their salaries and if so, how?

(5) Are lobbyists required to report only part of their expenditures, and if so, by what standards or rules is this to be done?

In answer to your first question, it is our opinion that a full-time, year round employee of an interest group, who is registered with the Clerk of the House and the Secretary of the Senate, must, at the close of each session, report all of his expenditures made during the session to influence the passage or defeat of legislation. This report should specify the amount of, the purposes of, and the person who receives, each payment, a description of the legislation the employee is interested in (not merely the bill number), and whether he supports or opposes such legislation. We believe the payment so reported should be limited to those made to, or in behalf of, a member of the General Assembly, and not payments which may only indirectly affect the passage or defeat of legislation. Although the word "lobbying" is not used in the statute, we believe it was this practice that was sought to be regulated.

". . . As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed upon it below, namely, 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees,' . . . and does not reach . . . attempts 'to saturate

Honorable R. J. King, Jr.

the thinking of the community.' . . ." (United States v. Rumely, 345 U.S. 41, 46, 97 L.Ed. 770, 776 (1953))

Your second question asks about the reporting requirement imposed on a part-time lobbyist or one who is hired only during the period that the General Assembly is in session. We cannot see that the statute requires any different report from this lobbyist at the close of a regular or special session but the report required at the inception of a regular session covering the period since the last regular session would necessarily be negative in nature for this lobbyist if he is in fact not engaged as a lobbyist during the interim.

Your third question inquires as to whether a lobbyist must in addition to his own expenditures report the total expenditures of his organization (employer) which may ultimately influence legislation. We answer this in the negative for we believe that our law rather conspicuously ignores the employer or principal while focusing on the employee or agent who engages in direct lobbying.

Your fourth question asks if lobbyists are required to prorate their salaries and this too must be answered in the negative since our law is confined to a lobbyist's expenditures, and not his receipts.

Your fifth question inquires if lobbyists are required to report all, or only a portion, of their expenditures, and if the latter, what standard is to be used. Section 105.470 requires ". . . a detailed report . . . of all money expended . . . in carrying on his work; to whom paid; for what purposes; . . ." and ". . . a detailed report . . . of all money expended . . . in carrying on his duties as such registered agent. . . . This report shall indicate to whom the money was paid; for what purposes; . . ." We perceive no limitation as to the type of expenditure that must be reported other than that the expenditure bear some relationship to the ". . . purpose of attempting to influence the passage or defeat of any legislation by the general assembly. . ." and that the expenditure be made to, or in behalf of, a member of the General Assembly. Other jurisdictions have established a minimum expenditure amount before there is a reporting requirement (e.g. California, \$25 in a calendar year). However, we believe our law as presently written has no such specific qualification of the expenditure reporting requirement, and consequently lobbyists should report all their expenditures that fit the general purposes of the statute as above set out.

CONCLUSION

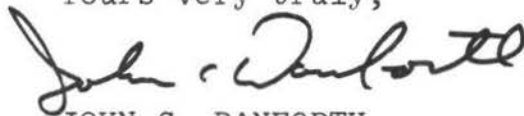
It is the opinion of this office that the financial reports required by Section 105.470, RSMo, Supp. 1967, should disclose all

Honorable R. J. King, Jr.

expenditures made to, or in behalf of, a member of the General Assembly for the purposes of attempting to influence the passage or defeat of legislation by the General Assembly. It is further the opinion of this office that such financial reports need not include the amounts received by persons to be used by them for the purpose of attempting to influence the passage or defeat of legislation by the General Assembly, but need only list the actual expenditures made by these persons for the stated purpose. The salaries of these persons need not be reported.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

INSURANCE:
LIFE INSURANCE AND
LIFE INSURANCE COMPANIES
SUPERINTENDENT OF INSURANCE

A Missouri domiciled life insurance company organized under the provisions of Sections 376.010 through 376.675, RSMo, is not permitted to use the common stock of a wholly-owned subsidiary which has been organized or acquired pursuant to the provisions of Section 375.355, RSMo Supp. 1967, as a special deposit required under Section 376.170, RSMo 1959.

March 20, 1969

OPINION NO. 120-69

Honorable Robert D. Scharz
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Scharz:

This official opinion is issued in response to your request for a ruling concerning whether or not a Missouri domiciled life insurance company, organized under the provisions of Sections 376.010 through 376.675, may deposit under Section 376.010, shares of the common stock of a wholly-owned subsidiary life insurance company acquired under the provisions of Section 375.355.

Under Section 376.170, RSMo 1959, all life insurance companies organized under the provisions of Section 376.010 to 376.670 are required to maintain special deposits with the superintendent of insurance. Section 376.170 states in full as follows:

"Special deposits for registered policies and annuity bonds. -- All life insurance companies organized under the provisions of sections 376.010 to 376.670, shall deposit with the superintendent of the insurance division, in addition to other amounts required by law to be deposited by life insurance companies before such companies are permitted to engage in the business of issuing policies of life insurance and annuity bonds, cash or securities of the kind and type in which life insurance companies are required to

Honorable Robert D. Scharz

invest their funds under section 376.300, as same now is or as same may be hereafter amended, in an amount sufficient to equal the net value on all policies or annuity bonds hereafter issued by such companies, the amount thereof to be determined by an evaluation made in accord with the provisions of sections 376.010 to 376.670."

Under Section 375.355, RSMo Supp. 1967, any insurance company organized under the laws of this state may, with the approval of the superintendent of the Division of Insurance, organize or acquire and hold not less than the majority of the common stock of another insurance company.

Section 376.305, RSMo 1959 provides that the capital, reserve and surplus of all life insurance companies of whatever kind and character organized and doing business under Sections 376.010 to 376.670 may be invested in the common stock of certain corporations under certain conditions and that such common stock which meets the qualifications as prescribed in that section shall be eligible for deposit as provided under Section 376.170. Section 376.305 provides in full as follows:

"1. In addition to the investments permitted by section 376.300, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized or doing business under sections 376.010 to 376.670, may be invested in the common stock of any solvent corporation, organized under the laws of the United States, any state, territory or possession of the United States, or the District of Columbia, provided the corporation's net worth as shown on its balance sheet at the end of the last fiscal year preceding purchase shall have been at least ten million dollars and cash dividends shall have been earned and paid on its common stock in each of the five fiscal years preceding such acquisition; provided further that all prior obligations or preference stocks of such corporation, if any, are eligible for investment under any of the provisions of section 376.300, and that such common stocks are registered on a national securities exchange

Honorable Robert D.Scharz

or quoted in established over-the-counter markets. Common stocks meeting the preceding qualifications shall be eligible for deposit, as provided under section 376.170.

"2. No such life insurance company shall invest in excess of five per cent of its admitted assets or fifty per cent of its surplus, whichever is the lesser, as shown by its last annual statement preceding the date of acquisition, as filed with the superintendent of the insurance division of the state of Missouri, in the total amount of such common stocks, nor shall such life insurance company own securities described in subdivision (7) of subsection 1 of section 376.300, and subsection 1 of this section, which, in the aggregate, represent more than five per cent of the total of all outstanding shares of stock of the issuing corporation, nor shall any such life insurance company own common stock described in subsection 1 issued by any one corporation which represents more than one-half of one per cent of the admitted assets of such life insurance company."

We must remember, of course, that the question concerns the stock of a wholly-owned subsidiary. An examination of the requirements of Section 376.305 makes it clear that the wholly-owned subsidiary could not qualify under that section.

As we have stated, Section 375.355 permits an insurance company, with the approval of the superintendent, to either organize a subsidiary insurance company or acquire the same by purchase or otherwise and hold not less than the majority of the common stock of such subsidiary. There is no authority in that section to permit such stock to be eligible for deposit; although by comparison, Sections 376.301, RSMo Supp. 1967, 376.303, RSMo Supp. 1967 and 376.305, RSMo 1959, specifically state that certain investments shall be eligible for deposit as provided under Section 376.170, RSMo 1959. By contrast, Section 376.307, RSMo Supp. 1967, which authorizes certain investments which do not otherwise qualify under the provisions of Chapter 375 or 376, RSMo expressly provides that such investments are not eligible for deposit with the Division of Insurance.

We conclude therefore that the legislature has specifically authorized certain types of investments to be held as legal deposits within the requirements of Section 376.170 and that there

Honorable Robert D. Scharz

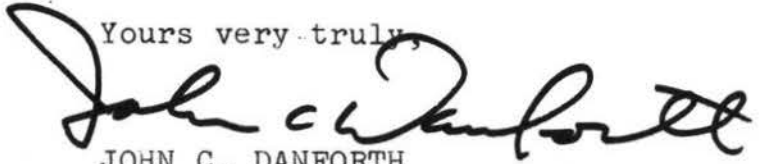
is no authorization for the common stock of a wholly-owned subsidiary organized or acquired under Section 375.355 to be used as such deposit.

CONCLUSION

Therefore, it is the opinion of this office that a Missouri domiciled life insurance company organized under the provisions of Sections 376.010 through 376.675, RSMo, is not permitted to use the common stock of a wholly-owned subsidiary which has been organized or acquired pursuant to the provisions of Section 375.355, RSMo Supp. 1967, as a special deposit required under Section 376.170, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

February 3, 1969



Honorable James E. Godfrey
Speaker
House of Representatives
Room #308
Capitol Building
Jefferson City, Missouri 65101

Dear Speaker Godfrey:

This is in answer to your recent request for an official opinion from this office which request reads as follows:

"Would you please issue an opinion clarifying the status of the compensation of the General Assembly as to what should be received and to whom it should be paid."

Section 16, Article III of the Constitution of Missouri provides as follows:

"Senators and representatives until otherwise provided by law, shall receive from the state treasury as salary the sum of one hundred and twenty-five dollars per month. No law fixing the compensation of members of the general assembly shall become effective until the first day of the regular session of the general assembly next following the session at which the law was enacted. Upon certification by the president and secretary of the house of representatives as to the respective members thereof, the state comptroller shall audit and the state treasurer shall pay such compensation without legislative enactment. Senators and representatives shall receive one dollar for every ten miles traveled in going to and returning from their place of meeting, twice per month, while the legislature is in session, on the most usual route."

House Bill No. 100 of the 74th General Assembly (Section 21.140 RSMo Supp. 1967), provides as follows:

"Senators and representatives shall receive from the treasury as salary the sum of eight thousand four hundred dollars per year. Upon certification by the president and secretary of the senate and by the

speaker and clerk of the house of representatives as to the respective members thereof, the state comptroller shall audit and the state treasurer shall pay such compensation in equal monthly payments. Senators and representatives shall receive one dollar for every ten miles traveled, and an amount for travel for any fractional part of ten miles at the same rate, in going to their place of meeting in Jefferson City from their place of residence, and returning from their place of meeting in Jefferson City to their place of residence, twice per month, while the legislature is in session, on the most usual route."

Under the specific language of Section 16 of Article III of the Constitution, the provisions of House Bill 100 of the 74th General Assembly providing for an increase of the salary of Senators and Representatives from \$4800 per year to \$8400 per year could not become effective before January 8, 1969, the first day of the regular session of the 75th General Assembly.

There is no constitutional provision specifically setting out the date the terms of Senators and Representatives begin.

Section 3 of Article III of the Constitution provides that Representatives shall be elected at each general election.

Section 5 of Article III of the Constitution provides that Senators shall be elected for four years.

Section 15 of Article III of the Constitution provides that Senators and Representatives shall subscribe an oath or affirmation before entering upon the duties of their offices such oath to be administered in the halls of the respective houses by a Supreme Court or a Circuit Judge or other organization by the presiding officer of either house. Such section further provides that a Senator or Representative refusing to take such oath or affirmation shall be deemed to have vacated his office. Such sections do not provide for the beginning of the term of office of Senators or Representatives.

Section 20 of Article III of the Constitution provides in part as follows:

"The general assembly shall meet in regular sessions on the first Wednesday after the first day of January following each general election. * * *

Section 21.010, RSMo, provides in part as follows:

"The general assembly shall meet on the first Wednesday after the first day of January in the year 1881, and on the corresponding day of January every second year thereafter; * * *

Section 20 of Article III of the Constitution and Section 21.010 RSMo, contain the only provisions concerning the date on which Senators and Representatives are to assume the duties of their offices.

Honorable James E. Godfrey

It follows that the terms of office of Senators and Representatives begin on the first Wednesday after the first day of January following their election.

In view of the fact that legislators' terms start on the first Wednesday after the first day of January of odd numbered years and that the effective date of a laws setting legislators' salaries cannot be prior to the first day of the regular General Assembly following the session at which such law was enacted, we believe it to be clear that the provisions for payment to Senators and Representatives "as salaries the sum of eightythousand four hundred dollars per year" found in House Bill 100 of the 74th General Assembly does not refer to calendar years.

We believe that it is clear that the reference is to the period of two years during which Senators and Representatives occupy their offices as members of the General Assembly beginning with the first day of the convening of the general assembly in regular session on the first Wednesday after the first day of January in odd numbered years and ending on the first Wednesday after the first day of January two years later when the succeeding General Assembly next convenes in regular session and that House Bill 100 provides for a total salary for legislators of \$16,800 for such two years. We shall refer to such "years" which begin with the first day of the regular session of the general assembly as "legislative" years.

Payment of the salary provided by statute under House Bill 100 should, therefore, be made in equal monthly payments during such legislative years.

Section 5 of Article III of the Constitution provides that Senators shall be elected for four years. It is our view that a Senator who is sworn in on the first Wednesday after the first day of January following his election serves for a term of four legislative years insofar as salary is concerned even though he may actually serve several days more or less than four years of 365 days due to the fact that the first Wednesday after the first day of January falls on different dates in different years.

While Section 3 of Article III of the Constitution does not set out a term of office for Representatives it is our view that the term of a Representative is for two legislative years from the first Wednesday after the first day of January of the year following his election insofar as compensation is concerned, even though he may serve several days more or less than two years of 365 days because of the fact that the first Wednesday after the first day of January falls on different dates in different years.

We believe that the clear intent of Section 21.140 RSMo, is that legislators shall receive the salary provided for in such section each legislative year they hold title to their offices.

Senators and Representatives who were sworn in office on January 8, 1969, as well as Senators who were elected in 1966 and held over will receive during the period January 8, 1969, to January 6, 1971, (the date of convening of the regular session of the 76th general Assembly) the sum of \$16,800 in twenty-four equal monthly payments

Honorable James E. Godfrey

of \$700, the first payment to be for the period January 8, 1969, to February 8, 1969, the second monthly payment to be for the period of February 8, 1969, to March 8, 1969, etc.

However, as pointed out above, legislators serve two legislative years from the date of convening of the regular sessions of each General Assembly. Therefore, the twenty-fourth payment of members of the 75th General Assembly will be for the period December 8, 1970, to January 6, 1971, the date of convening of the regular session of the 76th General Assembly, in the same amount as the previous twenty-three payments.

Legislators who held office during the entire 74th General Assembly were, under the provisions of House Bill No. 1 of the 70th General Assembly entitled to a salary of \$4300 per year or a total salary of \$9600 during the two legislative years of such General Assembly. The regular session of the 74th General Assembly convened January 4, 1967. The members of the 74th General Assembly who held office during the period January 4, 1967, to January 8, 1969, the date of convening in regular session of the 75th General Assembly have been paid \$9600 at the rate of \$400 per month for such two legislative years, the twenty-fourth monthly payment of \$400 being for the period December 4, 1968, to January 8, 1969.

It follows that those legislators who did not run for re-election in 1968 or who were defeated and who are, therefore, not members of the 75th General Assembly have been paid their full salaries of \$9600 for their services as members of the 74th General Assembly and are not entitled to any further payment.

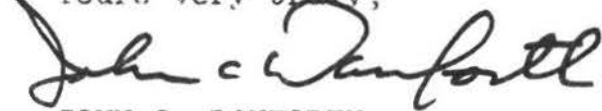
CONCLUSION

Therefore, it is the opinion of this office that Senators and Representatives who serve in the 75th General Assembly from January 8, 1969, (the date of convening of the 75th General Assembly) until January 6, 1971, (the date of convening of the 76th General Assembly) will receive a total salary of \$16,800 for such period payable in twenty-four monthly payments of \$700.

Representatives and Senators from districts in which Senators were elected in 1968 who served in the 74th General Assembly from January 4, 1967, (the date of convening of the 74th General Assembly) until January 8, 1969, (the date of convening of the 75th General Assembly) who did not run for re-election or who were defeated have received \$9600 total salary for such period and are not entitled to any further salary payment.

The foregoing opinion, which I hereby approve, has been prepared by my assistant C. B. Burns, Jr.

Yours very truly,

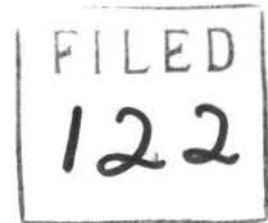


JOHN C. DANFORTH
Attorney General

June 13, 1969

OPINION LETTER NO. 122
Answer by letter-Nowotny

Honorable James E. Godfrey
Speaker, House of Representatives
Room 308, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Speaker:

This is in reply to your request for an official opinion of this office in which you ask the meaning of "qualified voters" as used in Section 120.180, RSMo 1959.

Section 120.180 provides for nominating petitions for independent candidates and reads as follows:

"Nominations of independent candidates (not candidates of any political party) for any office to be filled by the voters of the state at large may also be made by nomination petitions signed in the aggregate for each candidate by a number of qualified voters in each of the several congressional districts which shall equal one percent of the total number of votes cast in such district for governor at the next preceding gubernatorial election, or by a number of qualified voters in each of one-half of the several congressional districts which shall equal two percent of the total number of votes cast in such district for governor at the next preceding gubernatorial election. Nominations for independent candidates for public office within any district or political subdivision less than the state,

Honorable James E. Godfrey

may be made by nomination petitions signed in the aggregate, for each candidate by qualified voters of the district or political subdivision, equaling not less than two percent of the number of persons who voted at the next preceding general election in such district or political subdivision in which the district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. Each voter signing a nominating petition shall add to his signature his place of residence, and each voter may subscribe to one nomination for any office to be filled, and no more."

Although Section 120.180 does not define "qualified voters," the section does refer to the elections for which the "qualified voters" cast their ballots. The general requirements enacted by the legislature for voting in general elections is Section 111.060, RSMo 1959, which section implements the constitutional qualifications of voters found in Section 2, Article VIII, Constitution of Missouri. Section 111.060 reads as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

Honorable James E. Godfrey

In addition to the general statutory requirements, the Missouri Supreme Court has held that where registration is required a person must be registered to be a qualified voter. State ex rel. Woodson v. Brassfield, 67 Mo. 331, 336. Therefore, "qualified voters" as meant by Section 120.180 are those persons who are registered where registration is required and meet the general statutory requirements of voters.

Yours very truly,

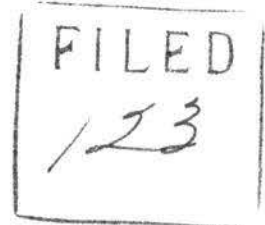
JOHN C. DANFORTH
Attorney General

COUNTIES: (1) A county court can enter into a contract
COUNTY COURT: with an individual agreeing to pay such
AMBULANCE SERVICE: individual not to exceed \$5,000 during a
year for ambulance services for which the
individual is unable to collect from persons for whom he has fur-
nished ambulance service if such individual submits said claims to
county court for the amounts he is unable to collect. (2) The
county court of a third class county does not have the authority
to make a deposit of county funds in an individual's name, allowing
him to draw upon said account for payment of ambulance services
for the amount he is unable to collect from persons for whom he
has furnished ambulance service.

OPINION NO. 123

August 7, 1969

Honorable Urban C. Bergbauer, Jr.
Prosecuting Attorney
Iron County Court House
Ironton, Missouri 63650



Dear Mr. Bergbauer:

This letter is in response to your request for an opinion relative to Section 67.300, RSMo. Supp. 1967, regarding the county court's authority to contract with an individual for ambulance services.

This opinion is directed to the three specific questions outlined by you, to wit:

"1. Does the county court of a third class county have the authority to make a deposit in an individual's name, allowing him to draw upon said account for payment of ambulance services whenever he is not paid by a customer?

"2. Can the county court enter into a contract with an individual agreeing to indemnify such individual up to \$5,000 during the year for ambulance services for which the individual is not paid, if such individual submits claims to the county court monthly for such unpaid bills?

"3. Can the unused portion of the \$5,000 deposit, if any, be carried over to the following year for such purposes by a contract entered into during this year, or should the remainder be returned to the county at the end of the year?"

Honorable Urban Bergbauer

Your request then is to be considered in light of Section 67.300. Such section provides:

"Counties and cities, towns and villages authorized to operate ambulance service - - rates may be set - - insurance may be purchased. - - 1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may

(1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;

(2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

(3) Employ any combination of the methods authorized in subdivisions (1) and (2) of this section.

"2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

"3. The municipality or county may purchase insurance indemnifying against liability of the county or city and the driver and attendants of the ambulance for the negligent operation of the ambulance or other equipment or supplies or in rendering services incidental to the furnishing of the ambulance service."

The first question for consideration is whether a county can enter into a service contract with an individual to furnish ambulance service, or, whether the county must acquire motor vehicles suitable for such purpose and contract with individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of the motor vehicles. Section 67.300, grants any county the broad right to:

Honorable Urban Bergbauer

"* * * Contract with one or more individuals, municipalities, counties, associations, or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment; * * *"

It is our view that Section 67.300 authorizes the county court to purchase or acquire by gift motor vehicles suitable for ambulance purposes, authorizes the letting of contracts to individuals to operate, maintain and repair vehicles owned by the county, and also authorizes the county to contract with individuals to furnish ambulance service by the use of vehicles owned or leased by such individuals. Therefore, the county court has the authority to enter into a contract with a private individual to provide an ambulance service.

The next question is whether the county court can enter into a contract for an indefinite amount, but for a maximum sum. The Supreme Court of Missouri has held that contracts made by a city, which are authorized, are no different than other contracts and are measured by the same tests and subject to the same rights and liabilities. State ex rel Kansas City Insurance Agents Assn. v. Kansas City, 4 S.W.2d 427. The principle enunciated in such case is equally applicable to a county court acting within its statutory authorization.

The Supreme Court of Missouri has further held in Burger v. City of Springfield, 323 S.W.2d 777, that a contract does not fail for lack of definiteness where at the time of execution of the contract the amount to be paid by one of the parties could not then be determined. l.c. 784:

"The mere fact that, at the time the contract was executed, the amount to be paid by the city could not then be determined in dollars and cents did not adversely affect the validity of the contract."

Thus, a county court can enter into a contract for an indefinite sum of money when the contract provides for a maximum amount to be paid by the county.

It is the conclusion of this office, therefore, that a county court may enter into a contract with an individual agreeing to pay such individual up to \$5,000 during the year for general ambulance services for which the individual is unable to collect from persons for whom he has furnished ambulance service if such individual submits claims to the county court for the amounts he is unable to collect.

Question No. 1 above concerns the authority of the county court to deposit funds to an individual's account with the account

to be drawn upon by said individual, for ambulance service charges which are not paid by the persons for whom he has furnished ambulance service.

There would appear to be no extra-ordinary grant of power in Section 67.300, which would broaden the manner in which a county court may handle its fiscal responsibility. The powers of the county court to audit and pay claims against the county are set out, in Section 50.160, RSMo 1959, which reads, in pertinent part:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of county treasury of all sums of money found due by the county on such accounts; * * * (Emphasis added)

Further authority for county court action in the area of claims against the county is found in Section 50.180, RSMo 1959, which reads in pertinent part:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, * * *" (Emphasis added)

Thus, it can be seen there must be a sum of money found due with said amount due to be paid by warrant issued by the county clerk.

The Supreme Court of Missouri has consistently held that the power of a county court is strictly statutory and as a consequence any deviation from prescribed statutory procedures is without the county court's competence. In Bauer v. Franklin County, 51 Mo. 205 (1873), the court in speaking of a county court's statutory authority, stated at 208:

"It invests them with authority when the county is a party, to audit, adjust and settle all accounts, and to order the payment out of the County Treasury of any sum of money found due by the county; and the only means they can resort to upon such adjustment or settlement is to order their clerk to issue a warrant (citing authority)"

It is the conclusion of this office that the county court of a third class county does not have the authority to deviate from the statutes set out herein by making a deposit in an individual's account allowing him to draw upon said account for payment of ambulance services.

Honorable Urban Bergbauer

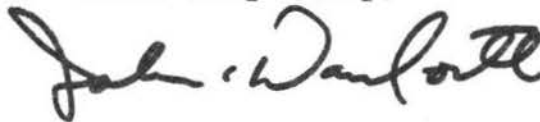
The third question herein involves the problem of whether any amount which is not drawn on by the ambulance service in the contract year may be automatically carried over in the account to the next fiscal year, or whether the remainder of the deposit should be returned to the county at the end of the year.

Because of our conclusion stated above, to wit: that the county court has no power or authority to make a deposit in an individual's name and allow him to draw upon said account for payment of ambulance services whenever he is not paid by a customer, the third question becomes moot.

CONCLUSION

Therefore, it is the opinion of this office that: (1) A county court can enter into a contract with an individual agreeing to pay such individual not to exceed \$5,000 during a year for ambulance services for which the individual is unable to collect from persons for whom he has furnished ambulance service if such individual submits said claims to county court for the amounts he is unable to collect. (2) The county court of a third class county does not have the authority to make a deposit of county funds in an individual's name, allowing him to draw upon said account for payment of ambulance services for the amount he is unable to collect from persons for whom he has furnished ambulance service.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a continuous script.

JOHN C. DANFORTH
Attorney General



3-3-69

Opinion Letter No. 124

Honorable Lawrence J. Lee
Senator - Third District
Capitol Building
Jefferson City, Missouri 65101

Dear Senator Lee:

This letter is in response to your request of January 31, 1969, relative to a proposed bill you intended to offer, captioned "An Act Relating to Industrial Development Assistance".

It would appear from reading your proposal that while the agencies contemplated are to be nonprofit, they do not appear to be public corporate bodies. Therefore, such private bodies are always open to special scrutiny under Article III, Section 38(a), Constitution of Missouri 1945.

This discussion is directed to the general question you outlined, to wit:

"Would the bill, as proposed, be constitutional if passed by the General Assembly?"

The portion of the proposed bill which could involve a constitutional conflict is in the authorization clauses of Section 4 and Section 4(2) wherein is contemplated the disbursal of funds by the Division of Commerce and Industrial Development on a matching fund basis:

"Section 4. The Division of Commerce and Industrial Development is hereby authorized to make grants to recognized industrial development agencies, to assist such agencies in the financing of their operational costs for the purposes of making studies, surveys and investigations, the compilation of data

Honorable Lawrence J. Lee

and statistics and in the carrying out of planning and promotional programs

"Section 4(2). The Division of Commerce and Industrial Development after review of the application, if satisfied that the program of the industrial development agency appears to be in accord with the purposes of this act, may authorize the making of a matching grant to such industrial development agency equal to funds of the agency allocated by it to the program described in its application"

In view of a contemplated grant of state monies, immediate consideration must be given to Article III, Section 38(a), Constitution of Missouri 1945, which states:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."
(Emphasis added)

The Supreme Court of Missouri has given the term "grant" definitional content in State ex rel Kelly, et al. v. Hackmann, 205 SW 161 (1918) by holding that the constitutional restriction is upon gratuitous grants of public money. Under consideration in that case was the demand upon the State Auditor to sign and deliver a warrant, agreed upon to be in the amount of \$20,000, payable to the partnership of Kelly and Kelly, which had been authorized by the following appropriation act of the General Assembly:

" . . . There is hereby appropriated out of the state treasury chargeable to the capitol building fund that the sum of twenty-five

Honorable Lawrence J. Lee

thousand dollars for the relief of Kelly & Kelly of Kansas City, Missouri, in full payment of the plan submitted to the board of fund commissioners for the sale of state capitol bonds . . . "

The court, in holding that a peremptory writ of mandamus must issue to the State Auditor to pay the warrant, stated, at l.c. 165:

"The language in which the General Assembly made the appropriation answers the contention that it was a grant of public money within the inhibition of article 4, § 46, of the Constitution [present, article 3, section 38(a)]. The appropriation purports to be made to pay a claim of relators against the state for a plan submitted to the board of fund commissioners to sell the bonds; that is, to pay for a service rendered the state, and one for which, so far as the last-cited section of the Constitution is concerned, the Legislature might pay as lawfully as any other. The restriction of the Constitution is laid upon gratuitous grants of public money " (Emphasis added)

In Jasper County Farm Bureau vs. Jasper County, 286 SW 381 (1926), the procedure under attack was the action by which the County Court could appropriate funds for the use of the farm bureau, a voluntary association. The Supreme Court of Missouri held that no "grant" of public money was involved, stating l.c. 384:

" . . . Nor are the appropriations provided for under the Farm Bureau Act gifts or grants of public money to private associations or societies, but are rather appropriations in payment for expenditures in carrying out the work of a public county institution. . . "

Another case in which the Supreme Court has given content to the term "grant" is State v. Southwestern Bell Telephone Co., Banc, 92 SW 2d 612 (1938). That action was a proceeding in quo warranto to prohibit Southwestern Bell from maintaining its poles and conduits on, over, and under certain highways, the privilege for which Southwestern Bell paid nothing to the state. Commenting on the statute which conferred this privilege on Southwestern Bell, the court, in failing to find a "grant", stated, l.c. 164:

" . . . The respondent is a public utility engaged in furnishing telephone service to the general public. The General Assembly no doubt

Honorable Lawrence J. Lee

considered that the benefit of the general public arising from the promotion of the extension of such service justified the granting of the privilege of the use of highways. While the benefit may not be said to be a formal consideration, as that term is generally understood, yet it is that benefit and that consideration which takes this grant out of the class of grants prohibited by the Constitution."

The posture of the foregoing cases would thus lead to the conclusion that the term "grant" imports the granting of public money for which the state does not receive a quid pro quo.

Another instance in which the Supreme Court of Missouri has upheld an appropriation by the General Assembly to a private corporation is State ex rel. S. S. Kresge vs. Howard, 208 SW 2d 247 (1947). Relator brought a mandamus proceeding to compel the State Auditor to issue a warrant for repayment of an allegedly illegally exacted domestication tax. Defense was made that such a refund would be in contravention of Section 38 of Article III, Constitution 1945, Mo. R.S.A. The court, in holding that the warrant should issue found the tax had been illegally exacted and stated, l.c. 250:

"This prohibition does not apply to the appropriation to relator because it was in payment of a valid public obligation, and was not a grant or gift of public money."

Thus, if a valid legal obligation to pay may be found as it was in Kresge, the grant will not come within the constitutional prohibition of "grant".

In State v. Land Clearance for Redevelopment Authority, 270 SW 2d 44 (1954), the Supreme Court of Missouri had before it for determination the question of whether the selling of blighted land by the Authority, for a cost less than the cost of acquisition, demolition and improvement, constituted the granting of public money to private persons. The court found no "grant" of public money, stating l.c. 53:

" . . . It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy. . . . The great weight of authority is that there is no private grant where land is cleared for the purposes herein contemplated

Honorable Lawrence J. Lee

and is thereafter sold for a loss, but for its then fair value. (citing cases) In all these cases it is pointed out that the primary purpose of a redevelopment project is a public purpose, and that any benefits to private individuals are merely incidental to the public purpose. . . "

The court in such case upheld a procedure which involved overall monetary loss on resale of the land; attention should, however, be given to the fact that the private purchasers were required to pay a valuable consideration, to the extent of fair market value, as to amount to a quid pro quo in dealing with the Authority. Benefits accruing to private individuals do not fall within the constitutional proscription so long as such benefits "are merely incidental to the public purpose."

Another case which shows the concern of the Supreme Court of Missouri in finding a manifestation of "consideration" in agreements between the State and private persons is State ex rel. Highway Commission v. Eakin, 357 SW 2d 129 (1962). This case was brought by the Highway Commission in an attempt to condemn land to provide a substitute right of way for a common carrier's pipeline, the removal of which was necessitated by interstate highway construction.

The court, in holding that land might be condemned for an alternate right of way, found that no "grant" of public money was involved in light of the formal consideration which passed to the State from the common carrier; to wit: the surrendering to the State of the existing right of way which interfered with the highway.

Reliance in such case was on State v. Southwestern Bell, supra, with the court, however, in this instance, finding a formal consideration passing between the State and the common carrier, l.c. 134:

" . . . Under the record before us a formal consideration passes to the state for the relocation of Phillips' pipe lines; to wit: The surrender of a portion of Phillips' existing private right of way easement interfering with the proposed highway interchange. This involved factors closely connected with the safety and welfare of the traveling public and a right Relator could not compel Phillips to surrender without making some provision therefore . . . " (Emphasis added)

The cases under consideration thus illustrate that the Supreme Court of Missouri will require a finding that a quid pro quo is

Honorable Lawrence J. Lee

involved in any context in which public monies are appropriated by the General Assembly to be paid to a private person or corporation. If the payment is for services rendered, as in State ex rel Kelly v. Hackman, supra, or if valid legal obligations to pay arise, as in State ex rel S.S. Kresge v. Howard, supra, the court would most probably hold that no Article III, Section 38(a) prohibitions to appropriations are found.

It is, however, when the appropriation must depend on a finding of "formal consideration", as in State ex rel Highway Commission v. Eakin, supra, that the court appears to give closer scrutiny to the relationship between the State and the private person involved.

To avoid the constitutional prohibitions of Article III, Section 38(a), Missouri Constitution 1945, the public monies anticipated to be appropriated by your bill must be found to flow from a status of quid pro quo between the State and the several Industrial Development agencies. Moreover, any benefits which are private must be no more than incidental to the underlying public purpose to be served.

One basis for argument is that the general public welfare is served by the results accomplished by a bill such as you contemplate introducing. It must be remembered, however, that in each of the foregoing cited cases the court looked for some indicia of consideration on which to hold that a benefit of legally recognizable proportions flowed to the public. Abstract speculation on incidental benefits which may arguably accrue to the State would appear to be insufficient.

There is in the bill a section, Section five, which would seem to lead to the conclusion that a contractual relationship is to exist between the individual agencies and the Division of Commerce and Industrial Development, which would contemplate the grant in return for services rendered, to wit:

"Section 5. Upon approval of each application and the making of a grant by the division in accordance therewith, the division shall give notice to the particular industrial development agency of such approval and grant, and shall direct the industrial development agency to proceed with its proposed research and promotional program as described in its application and to use therefrom funds allocated by the industrial development agency for such purpose. Upon the furnishing of satisfactory evidence to the department, on a quarterly basis, that the particular industrial development agency has so proceeded,

Honorable Lawrence J. Lee

the grant allocated to such industrial agency shall be paid over on such basis to the industrial development agency by the department."
(Emphasis added)

To a certain extent the emphasized portion could be said to contemplate a service function which is to be carried out by the industrial agencies. By clarification of this portion, however, the agencies could be viewed much as the parties were viewed in State ex rel Kelly v. Hackman, supra. By affirmatively stating some of the types of "evidence" on which the Division of Commerce and Industrial Development would be justified in extending quarterly payments, the entire tenor of the contemplated relationship between the State and the private body could be more easily understood.

Section six of your bill, by which the Division of Commerce and Industrial Development is to have rule-making power, could conceivably contemplate that before a grant is to be issued to an industrial agency the Division will require a form of quid pro quo to exist. The standards by which the Division is to make such a determination are, again, vaguely stated.

A restructuring of these sections setting forth definite standards from which it can be seen that the State will receive some tangible form of formal consideration, for the monies appropriated the industrial agencies, would make the bill less susceptible to constitutional attack.

Section 38(a) does apparently in its ultimate sentence offer an alternative if federal funds are to make up any part of the funds to be held by the industrial agencies; to wit:

" . . . Money or property may also be received from the United States and be redistributed together with public monies of this state for any public purpose designated by the United States."

Thus, if one of the criterion for the Divisions' granting funds were to be the inclusion of federal funds to be redistributed, the bill would be on firmer constitutional ground.

Therefore, we conclude that to the extent your final draft will clearly set out the legal basis of a quid pro quo between the State and an industrial agency it would be on firmer constitutional grounds to be upheld by the Missouri courts. However, on the basis of the draft which has been submitted to us, we feel that the benefits flowing to the public are so vague, uncertain and indefinite that the bill, if passed, might well be held unconstitutional.

Yours very truly,

JOHN C. DANFORTH
Attorney General



April 16, 1969

Opinion Letter No. 125

Honorable James N. Foley
Prosecuting Attorney
Macon County Courthouse
Macon, Missouri 63552

Dear Mr. Foley:

This is in response to your opinion request as follows:

"I would appreciate your advising if there is an opinion concerning the disposition of guns that were used in felonious assault or murder cases. A defendant in our county shot and killed his brother and has now served his sentence and has now requested that the gun he used to kill his brother be returned to him. Do we have to give it to him?"

We assume the gun in question is the type of gun the owner may own and possess legally. We are unable to find any court decisions in this state or any statutes governing this matter.

In 79 C.J.S., Section 114:

"The property of accused in a criminal case, seized by officers and used as evidence, generally will be returned to him upon his proper application, and property taken under a search warrant is generally returned to its rightful owner when no longer needed in aid of a criminal prosecution if its ownership is undisputed * * * " .

In Lange vs. McMillium, 86 SE 2d 477, 226 S.C. 598, the court held a pistol used in a felonious assault case, of and by itself, was not contraband and the owner from whom it was taken by the police was entitled to its return.

Honorable James N. Foley

It is the opinion of this department that a gun belonging to the accused and used in a criminal act, seized by the officer and used as evidence, should be returned to him upon proper application, after the conclusion of the trial and after such person has served the sentence imposed on him as a result of such trial, if the gun is of the type he may legally own and possess.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Gardner

March 28, 1969

OPINION LETTER NO. 126



Honorable R. Jaynes
Prosecuting Attorney
Howard County
Courthouse
Fayette, Missouri 65248

Dear Mr. Jaynes:

This is in response to your request for an official opinion on the following question:

"After a person is elected at a special election (28 February, 1969) to fill the office of sheriff under Section 57.080, RSMo 1959, when is the next election to be held for sheriff: is it at the next general election (which would be in 1970), or is it at the general election which comes in a year as set forth in Section 57.010, RSMo 1959 (which would be in 1972)?"

Elections cannot be held except as authorized by law. State v. Tellatson, 304 S.W.2d 485, 487. The only statutes authorizing elections to fill the office of sheriff are Sections 57.080 and 57.010, RSMo. In Section 57.080 the legislature has authorized a special election to fill a vacancy in the office "if such vacancy happens more than nine months prior to holding a general election." In Section 57.010 the legislature has prescribed the general election at which the office is to be filled when the incumbent's term expires. The first sentence of Section 57.010 is as follows:

"At the general election to be held in 1948, and at each general election held every four years thereafter, the qualified voters in every county in this state shall elect some suitable person sheriff.* * *"

Honorable R. Jaynes

It appears therefore that in Section 57.080 the legislature has provided for the filling of vacancies in the office of sheriff in these circumstances until a general election is held pursuant to Section 57.010. Accordingly, the person elected sheriff at a special election held pursuant to Section 57.080 on February 28, 1969, holds office for the remainder of the unexpired term, that is until the regular general election prescribed by Section 57.010 is held in 1972.

Yours very truly,

JOHN C. DANFORTH
Attorney General

COMPENSATION:
MAGISTRATES:
MAGISTRATE CLERK:
CLERKS:

A duly appointed magistrate clerk continues to hold office in the interim following the death of the appointing magistrate and until the appointment of a clerk by a magistrate appointed by the governor to fill the vacancy and that the clerk is entitled to compensation for such period.

OPINION NO. 127

August 21, 1969

Honorable William G. Johnson
Prosecuting Attorney
Morgan County Court House
Versailles, Missouri 65084

Dear Mr. Johnson:

This is in response to your request for an opinion from this office as to ". . . whether or not the Clerk of the Magistrate Court in a third class county who serves at the will of the appointing Judge is an employee of the state and/or county who is entitled to draw compensation for an interim period between the death of the Judge appointing and the appointment of a subsequent Judge who re-appointed the same Clerk. . . ."

The clerk of a magistrate court is appointed under the authority of Section 483.485, RSMo, which provides that:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court. . . . All such clerks, . . . shall serve at the pleasure of the magistrate. . . ."

A magistrate clerk would also fall under the purview of Section 105.010, RSMo, which states that:

"All officers elected or appointed by the authority of the laws of this state shall hold their office until their successors are elected or appointed, commissioned and qualified."

Our view of the situation described in your request is that the magistrate clerk, by virtue of an appointment by order of the court, is not an employee or agent of the judge. Rather, the clerk

Honorable William G. Johnson

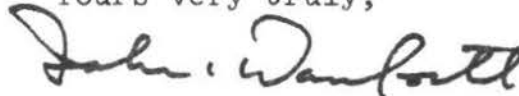
is an officer whose selection is made the responsibility and duty of a judge instead of the prerogative of the electorate. Because the record of a court and orders entered thereon are unaffected by the death of the judge of the court, the clerk's authority and tenure would therefore survive the demise of the appointing magistrate. It is our opinion that in the event a magistrate dies after duly entering on the record an appointment of a clerk, such clerk continues in office until removed by the appointing magistrate's successor, or by appropriate legal proceedings, the appointee resigns, a successor is named, or the legislature abolishes the office.

Since the magistrate clerk continues to hold office during the interim between the death of the appointing judge and the appointment of a new magistrate by the governor; we must further conclude that the clerk is entitled to compensation during the period, such compensation being an incident of the office itself. *Coleman v. Kansas City*, 173 S.W.2d 572; *State ex rel. Nicolai v. Nolte*, 180 S.W.2d 740.

CONCLUSION

It is the opinion of this office that a duly appointed magistrate clerk continues to hold office in the interim following the death of the appointing magistrate and until the appointment of a clerk by a magistrate appointed by the governor to fill the vacancy and that the clerk is entitled to compensation for such period.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Hoecker

August 12, 1969

OPINION LETTER NO. 131

Honorable Harold L. Volkmer
State Representative, District 100
120 North Third Street
Hannibal, Missouri 63401

Dear Representative Volkmer:

This is in answer to your recent request concerning the meaning of the term "nursery school" as used in subsection (4) of Section 210.211, RSMo 1959, and any relationship such term has with Section 210.201, RSMo 1959.

Sections 210.201 to 210.245, RSMo 1959, concern the licensing by the Division of Welfare of designated institutions providing custodial care for children. Three institutions subject to the licensing requirements are "boarding home for children," "day care home," and "day nursery" and are defined in Section 210.201, RSMo. Such section provides in part as follows:

"(1) 'Boarding home for children' shall be held to mean a house or other place conducted or maintained by any person who advertises or holds himself out as conducting, for compensation or otherwise, a boarding house or place of residence for one or more children who are unattended by parent or legally appointed guardian, except day care homes or day nurseries as defined in sections 210.201 to 210.245;

(2) 'Day care home' or 'day nursery' shall be held to mean a house or other place conducted or maintained by any person who advertises or holds himself out as providing care for more than four children during the daytime, for compensation or otherwise, except those operated

Honorable Harold L. Volkmer

by a school system or in connection with a business establishment as a convenience for its customers, and except boarding homes for children as defined in sections 210.201 to 210.245;"

While Section 210.211, RSMo 1959, requires the licensing of all institutions falling under the statutory definitions of Section 210.201, RSMo 1959, subsections 1 through 6 of Section 210.211, RSMo 1959, except from this licensing requirement of certain institutions. Subsection 4 of Section 210.211 lists "nursery school" as one of the institutions excepted from the licensing requirements.

Section 210.211 provides in part as follows:

"It shall be unlawful for any person to establish, maintain or operate a boarding home for children, a day care home or day nursery for children, or a child placing agency as defined in sections 210.201 to 210.245, or to advertise or hold himself out as being able to perform any of the services as defined in section 210.201, without having in full force and effect a written license therefor granted by the division of welfare, provided that nothing in sections 210.201 to 210.245 shall apply to:

"(4) any graded boarding school, nursery school, summer camp, hospital, sanitarium or home which is conducted in good faith primarily to provide education, recreation, medical treatment, or nursing or convalescent care for children;"

From the definition of "boarding home for children," "day care home," and "day nursery," it is seen that licensing requirements apply to institutions the primary function of which is to furnish only custodial care for children.

While Section 210.211 (4) includes several institutions and lists several primary functions which may be performed by such institutions, it is clear that in order to come within the definition of "nursery school" an institution must be conducted primarily to provide education for children. It is therefore our view that an institution in order to be classified as a "nursery school" which is exempt from licensing requirements must be operated primarily for educating children.

Yours very truly,

JOHN C. DANFORTH
Attorney General



Answer by letter-Chitwood

March 4, 1969

OPINION LETTER NO. 132

Honorable Albert F. Turner
Prosecuting Attorney
Wright County
Mountain Grove, Missouri 65711

Dear Mr. Turner:

This letter is in response to your request for an opinion upon the inquiry as to who pays the cost of an election for the formation of a hospital district when the larger portion of the proposed district is located in Wright County and a small portion is located in Douglas County. You further inquire if the Wright County Court orders the election held in the affected portion of Douglas County, who selects the judges and clerks of election and who pays them.

Sections 206.010 to 206.160, RSMo Cum. Supp. 1967, known as "The Hospital District Law" contains the statutory provisions relative to the creation, powers and duties of a hospital district.

Sections 198.200 to 198.350, RSMo Cum. Supp. 1967, known as "The Nursing Home District Law" contains the statutory provisions relative to the creation, powers and duties of a nursing home district.

Upon comparison of the Hospital District Law with the Nursing Home District Law, they are found to be basically the same, with only minor differences made necessary by reason of the particular kind of district involved.

The request for an opinion of this office by the Prosecuting Attorney of Caldwell County, Missouri, was answered by letter No. 416 to Paul Knudsen dated October 17, 1963. Said request was in regard to formation of a nursing home district which included territory in one county and a smaller portion of territory in an adjoining county.

Honorable Albert F. Turner

Among other matters it was concluded in said letter that the "declaring county court" or the one with the larger portion of territory and in which the petition for establishment of the district was filed should pay the expense of an election to vote on the proposition as to whether or not the hospital district should be established. Both the factual situation and statutes involved in said letter are so similar to those of the present inquiry as to be applicable thereto (copy enclosed).

From the present letter of inquiry it appears the petition for establishment of a hospital district was filed with the Wright County Court, and it also appears Wright County contains the larger portion, while adjoining Douglas County contains a lesser portion of territory of the proposed district.

In the event the Wright County Court finds the petition to be sufficient, it shall enter its order declaring the petition to be sufficient, and order an election to vote upon the proposition as to whether or not a hospital district shall be established. Such election is to be held within the time provided by Section 206.050.

Section 206.060 requires the County Court in which the petition is filed to give written notice of election to be posted within the time and manner therein provided and within the proposed district and provides what the contents of such notice shall be. Said notice shall briefly state the purpose setting forth the proposition to be voted upon at the election, form of ballot to be used, description of the territory, setting forth the election precincts and designating the polling places therefor.

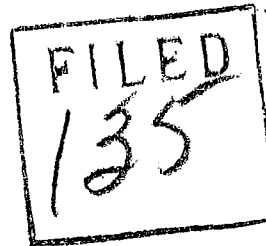
From the power given the county court to issue such a detailed notice of election, particularly to require the notices posted at various locations in the district and to specify the precincts and polling places therein, it is our view that such court is empowered to select the judges and clerks of such election for each precinct in said district, even though the territory of the district is located in more than one county.

In view of provisions of above cited statutes and for reasons given in the attached letter, it is our opinion that if the petition presented to the Wright County Court is found to be sufficient by it, the court has the mandatory duty of ordering the election to be held for the proposed district including territory in both Wright and Douglas counties. It is our further opinion that said Wright County Court shall appoint judges and clerks of election for each precinct of such proposed district and that Wright County shall pay the cost of election, including that of all judges and clerks who serve at such election.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 416
10-17-63, Knudsen



February 28, 1969

Answer by letter-Wieler

OPINION LETTER NO. 135

Honorable Harry Wiggins, Supervisor
State Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wiggins:

This is in response to your request for an opinion from this office concerning the question whether a local option election for sale of liquor by the drink can be held in a city whose 1960 census showed a population of less than 500 but whose population, as certified on June 9, 1965, as the result of a special census ordered by the Governor, was 536.

In order to hold a local option election for sale of liquor by the drink, Section 311.090 (1), RSMo 1959, requires that a city have a population of at least 500. It further provides that:

" . . . The population of said cities to be determined by the last census of the United States completed before the holding of said election; . . . " (Emphasis added)

The United States census is taken every ten years as provided by the United States Constitution, Article I, Section 2, clause 3. Further, 13 U.S.C.A., Section 141 provides for the census to be taken in the year 1960 and every ten years thereafter.

It is our opinion that the special census ordered by the Governor and certified to the State of Missouri on June 9, 1965, does not come within the meaning of Section 311.090 (1), RSMo 1959, which specifically calls for a United States census. We are aware of Section 71.170, RSMo 1959, which provides that the population shown by a special census " . . . shall be the legal census and population of such city or town, for all purposes

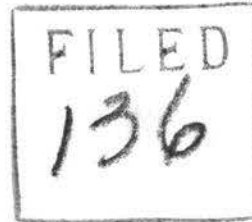
Honorable Harry Wiggins

whatsoever, under the constitution and laws of the state."; but it is our view that this is a general statute and, therefore, not controlling when in conflict with the provisions of Section 311.090, a special statute.

Therefore, in determining whether a city is qualified to hold a special election under Section 311.090, RSMo 1959, it is our opinion that only the decennial United States census figures can be used.

Yours very truly,

JOHN C. DANFORTH
Attorney General



April 30, 1969

OPINION LETTER NO. 136

Honorable G. William Weier
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri 63050

Dear Mr. Weier:

This acknowledges receipt of your recent letter in which you request an opinion of this office, the request reading as follows:

"Does the Sheriff of a County of the Second Class have the power to appoint special deputies other than under Section 57.119 RSMo 1959."

Section 57.119 RSMo provides as follows:

"In any emergency the Sheriff shall appoint sworn deputies, who are residents of the county, possessing all the qualifications of sheriff. The deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury.

In the case of State v. Owen, 258 SW 2d 662 the Supreme Court of Missouri referred to such deputies as "emergency deputy sheriffs."

We are enclosing opinion No. 15 rendered September 8, 1954, to John R. Caslavka which refers to such deputies as "emergency or special" deputies and holds that the residence provisions of Section 542.190 RSMo are applicable to such deputies.

Your attention is directed to Section 57.220 RSMo which refers to and authorizes the appointment of deputies in a county of the second class, and fixes the formula for determining the minimum number who may be appointed, and provides for the Judges of the Circuit Court to determine and authorize the necessary number.

Honorable G. William Weier

We are unable to find any provisions for appointment of deputy sheriffs in a second class county other than the provisions contained in Sections 57.220 and 57.119 RSMo.

It is, therefore, our view that such sections contain the only authority for appointment of deputy sheriffs in second class counties.

Yours very truly,

JOHN C. DANFORTH
Attorney General

August 29, 1969

OPINION LETTER NO. 139
Answered by Letter-Curtis

Honorable Alvin B. Walker
Prosecuting Attorney
Mercer County
Princeton, Missouri 64673

Dear Mr. Walker:

This letter is in response to your request for an opinion on two questions:

I.

Can a retired judge, having been designated a special commissioner for life under Section 476.450 RSMo, 1959, also hold the office of probate and magistrate judge of a fourth class county of Missouri and still draw the compensation provided by law for both services?

We note that Article V, Section 24, Missouri Constitution 1945, declares in part:

"No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms."

The question is whether or not a special commissioner is compensated for "public service" within the meaning of Article V, Section 24 and Section 482.030 (2). Compensation under Section 476.450 is not an automatic incident of long and honorable service; rather the retired judge must elect to receive it (Section 476.500), and by so electing he binds himself to

Honorable Alvin B. Walker

temporary duty by call from the Supreme Court (Section 476.460). Rendering oneself subject to special duty of this nature clearly must be considered a "public service". This commitment to public service is a prerequisite to receiving any compensation under Section 476.450 et seq. Thus a probate and magistrate judge would necessarily be receiving "additional compensation for . . . other public service" if he continued to receive compensation as a special commissioner.

Therefore it is the opinion of this office that a special commissioner who has been elected to the office of probate and magistrate judge of a fourth class county cannot continue to receive compensation as a special commissioner under Sections 476.450 et seq. because such practice would be in violation of Article V, Section 24, the Missouri Constitution and Section 482.030 (2) RSMo.

II.

In the event he chooses to do so, can a retired judge and special commissioner voluntarily waive the retirement pay as a special commissioner for an indefinite time and then at his election again resume the same at some future time?

Sections 476.450 et seq. contain no provision as to when a retired judge must elect to request a special commission from the governor, nor does the statute prohibit a resignation and subsequent second election. We note however that an attempt to merely waive compensation would raise serious questions of incompatibility between offices.

Therefore, it is the opinion of this office that there appears to be no statutory prohibitions against a special commissioner resigning his commission to serve the public in another capacity, and at the conclusion of such additional service reelecting to obtain his special commission and the incidents thereto.

Very truly yours,

JOHN C. DANFORTH
Attorney General

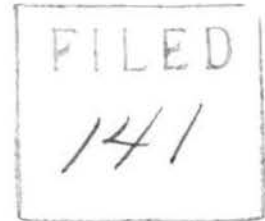
COUNTY COURT:
ROADS AND BRIDGES:

A county court may use the road and bridge fund to purchase real estate in the county for the purpose of storing machinery used to keep up and build county roads and bridges.

OPINION NO. 141

August 11, 1969

Honorable John W. Reid, II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Reid:

This official opinion is rendered in response to the request contained in your letter dated July 1, 1969.

The question presented is:

"Is it permissible under Missouri Revised Statute 137.555 for the County Court to use the road and bridge fund to purchase real estate, for the purpose of storing machinery used to keep up and build county roads and bridges?"

Section 137.555, RSMo 1959, in pertinent part, provides as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government * * * in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; * * *"

This section of the statute implements Article X, Section 12(a) of the Missouri Constitution which states, in part:

Honorable John W. Reid, II

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, * * * may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. * * *"

The question presented relates to the county court of Madison County, a county of the third class. For purposes of this opinion, it has been assumed that the real estate to be purchased is located in Madison County.

Section 49.270, RSMo 1959, gives the county court express authority to purchase real estate. This statute provides:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; * * *"

Section 229.040, RSMo 1959, states:

"Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, * * * shall have full power and authority to construct, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county * * * and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor."

It will be observed that the additional levy authorized by Article X, Section 12(a) of the Constitution and Section 137.555, RSMo 1959, require that such moneys be placed in "The Special Road and Bridge Fund" and be used for "road and bridge purposes." Thus, the point is not only whether the county court can purchase real estate for use and benefit of the county but whether the proposed expenditure of money is for "road and bridge purposes."

Honorable John W. Reid, II

It is clear from the statute that the county court is expressly empowered to purchase real estate for the use and benefit of the county and that the county has control and management of the property, real and personal, belonging to the county. Likewise, the county court is expressly authorized to purchase machinery to be used for road and bridge purposes and has full power and authority to construct, reconstruct or otherwise improve any county road. While the statutes do not specifically provide for the purchase of real estate for the purpose of storing machinery, the rule for interpreting statutes, that a power given carries with it, incidental or by implication, power not expressed but necessary to render effective the one that is expressed, would require the construction that authority to purchase, own and use road machinery embraces authority to buy a place for its storage, care and preservation. State ex rel Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; Blades v. Hawkins, 240 Mo. 187, 112 S.W. 979.

In Everett v. County of Clinton, 282 S.W.2d 30 (Mo. Sup. Ct.), the Supreme Court held that a county has full authority to purchase real estate for the use and benefit of the county, as well as materials for road construction and repair, and it has authority to control and manage such real estate and personal property. In the opinion the court said:

"In this case there is no claim that there is any statute which expressly gives to the county power to operate a rock quarry. If such power exists, it must be looked for among those powers which can be implied only as being essential to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the county by statute. If such a power exists, it must be one related to the subject with which the county has authority to deal in discharging a duty imposed by law. King v. Maries County, supra; Blades v. Hawkins, supra. The right to acquire, own and control a rock quarry and the express grant of power to construct and reconstruct roads carries with it, we believe, the right to use and operate the quarry for county purposes and to mine, prepare and use such material on the public roads of the county. While it is true that the law is strict in limiting the authority of county courts, 'it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental

Honorable John W. Reid, II

powers germane to the authority and duties expressly delegated and indispensable to their performance may be exercised.' *Blades v. Hawkins*, supra, 240 Mo. 187, 197, 112 S.W. 979, 982."

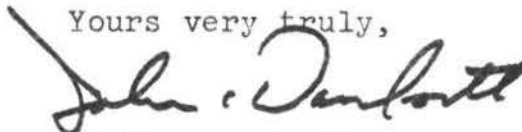
Considering the foregoing authority it is our view that an expenditure for the purchase of real estate by the county court under these circumstances is proper.

CONCLUSION

It is our opinion that a county court may use the road and bridge fund to purchase real estate in the county for the purpose of storing machinery used to keep up and build county roads and bridges.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", with a large, sweeping initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

August 4, 1969



OPINION LETTER NO. 142
Answered by letter-Park

Robert L. Hyder, Esq.
Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri

Dear Mr. Hyder:

This will acknowledge receipt of your letter dated February 13, 1969, requesting our advice as to whether paragraph 4, of Section 304.021, RSMo 1959, requires a motorist to obey the command of a stop sign posted by the State Highway Commission at the entrance of public roads and minor routes into through highways.

Subdivision 4 of Section 304.021, RSMo 1959, provides as follows:

"The driver of any vehicle shall stop as required by this section at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection on the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard. The state highway commission may erect stop signs at the entrance of any public road into a through highway."

It is evident the legislature intended to authorize the State Highway Commission to control traffic at intersections of public roads and through highways by use of stop signs. This is expressly provided in the last sentence of paragraph 4, i.e.,

Robert L. Hyder, Esq.

"The state highway commission may erect stop signs at the entrance of any public road into a through highway." This should be read in conjunction with the preliminary language of the paragraph which states "The driver of any vehicle shall stop as required by this section at the entrance to a through highway * * * ." Subdivision 1 of Section 304.021, RSMo, provides as follows:

"The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway, provided, however, there is no form of traffic control at such intersection."

A stop sign is a form of traffic control. Creech v. Blackwell, 298 S.W.2d 394 (Supreme Court of Missouri 1957). In this case the court in construing Section 304.021, subdivision 1, RSMo 1949, said in part, " * * * we must conclude that the stop sign was a form of traffic control * * * ." As indicated before, we believe subdivision 1 should be considered in construing subdivision 4. Furthermore, we feel that a construction of this section of the statute which has the effect of making the erection of stop signs by the State Highway Commission meaningless is not justified.

Accordingly, it is our opinion that this statute does require a driver of any vehicle to stop at the entrance to a through highway where the State Highway Commission has caused a stop sign to be erected.

Letter Opinion of Attorney General to Colonel Hugh H. Wagginer, Superintendent, Missouri State Highway Patrol, dated March 30, 1955, is hereby withdrawn.

Very truly yours,

JOHN C. DANFORTH
Attorney General

(S. 64.755 is now Sec. 67.755),
See RSMo. 1969

CONSTITUTIONAL LAW:
PARKS:
RECREATION GROUNDS:
CITIES, TOWNS AND
VILLAGES:
TAXATION:

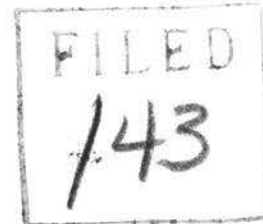
The City of Rolla may, if approved by the voters, levy and collect an additional twenty cents special tax for recreational purposes under Section 64.755, RSMo Supp. 1967, in addition to a tax

levy of eighty cents for municipal purposes under Section 94.060, RSMo 1959, and twenty cents for park purposes under Section 90.500, RSMo Supp. 1967.

OPINION NO. 143

June 12, 1969

Honorable A. Basey Vanlandingham
Missouri State Senator-19th District
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Vanlandingham:

This is in answer to your request for an opinion of this office as to whether the City of Rolla may, if approved by the voters, levy and collect an additional twenty cents special tax for recreational purposes under Section 64.755, RSMo Supp. 1967, in view of the fact that Rolla already has a tax levy of eighty cents for municipal purposes under Section 94.060, RSMo 1959, and twenty cents for park purposes under Section 90.500, RSMo Supp. 1967.

Enclosed is a copy of Attorney General Opinion No. 102 dated June 29, 1962, issued to the Honorable Chester W. Hughes, which held that third class cities levying eighty cents tax for municipal purposes under Section 94.060 and twenty cents tax for park purposes under Section 90.500, RSMo, may vote a tax levy for recreational purposes not to exceed twenty cents under Section 64.755, but that the combined levy for park and recreation purposes cannot exceed twenty cents.

It is our opinion that Opinion No. 102 is still valid, taking into account, of course, the amendment to Section 90.500. Subsequent to Opinion No. 102 the Missouri General Assembly amended Section 90.500 so as to increase the maximum allowable levy from twenty cents to forty cents. Therefore, if the con-

Honorable A. Basey Vanlandingham

stitutional limitation of one dollar imposed by Section 11(b) of Article X, Constitution of Missouri, is not exceeded, Rolla can levy and collect a tax of twenty cents under Section 64.755 since this levy combined with the twenty cents levy under Section 90.500 does not exceed forty cents.

Section 11(b), Article X, Constitution of Missouri provides in part:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;"

On page 5 of Opinion No. 102 it was held that a levy voted under Section 90.500 is a levy within the constitutional limits of one dollar per one hundred dollars valuation set forth in Section 11(b) of Article X of the Constitution. Therefore, since Rolla already has a one dollar levy comprised of eighty cents for municipal purposes under Section 94.060 and twenty cents for park purposes under Section 90.500, the only way Rolla could now impose an additional levy above the statutory limitation of twenty cents under Section 64.755 would be if such additional levy is authorized by law under Section 11(c), Article X, of the Constitution.

Section 11(c), Article X, provides that the rates of taxation in municipalities, counties and school districts may be increased by a vote of the people for specified periods of time and in addition provides as follows:

" * * * and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

It is our opinion that the facilities provided for in Section 64.755 are included in the term "recreation grounds" found in Section 11(c), Article X. Therefore, the question is whether Section 64.755 authorizes a levy in excess of the constitutional limitation.

The applicable part of Section 64.755 reads as follows:

"2. If sufficient funds cannot be made available from ordinary levies, additional funds may

Honorable A. Basey Vanlandingham

be raised by a special tax levy, general obligation bond issue within constitutional limits or revenue bond issue, but no special tax shall be levied or any bonds issued by any political subdivision unless the rate and purpose of the tax or bond issue is submitted to a vote and a two-thirds majority of the qualified voters voting thereon vote therefor. The rate of such special tax levied by one or more political subdivisions shall not total in the aggregate more than twenty cents on each one hundred dollars assessed valuation of all real and tangible personal property subject to its or their taxing powers. In the event that any political subdivision is now authorized by statute to levy a tax for this purpose, the combined levies authorized by such statute and by this section shall not exceed the larger levy authorized. All ballots submitting such special tax to the voters shall state on their face the rate of the proposed levy in cents per hundred dollars of assessed valuation."

It is our opinion that in the absence of an express statement in Section 64.755 that the tax provided for is within or in excess of the constitutional limitation that the legislative intent should be construed that Section 64.755 provides for an authorization for a tax in addition to the constitutional limit, since it is for one of the purposes for which a tax can be authorized by the legislature in excess of the constitutional limitation.

The legislative intent is further indicated by the statement [I]f sufficient funds cannot be made available from ordinary levies, additional funds may be raised by a special tax levy, * * * ". This language would be meaningless if the levy could not be in excess of the constitutional limits because additional funds could not, as a practical matter, be raised above the ordinary levy already provided for by Section 94.500. Further, the fact that a two-third's vote is necessary for imposition of the tax levy under Section 64.755 indicates that it was the intent of the legislature to authorize the levy of the tax in addition to the constitutional limitation.

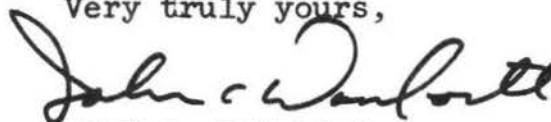
CONCLUSION

It is the opinion of this office that the City of Rolla may, if approved by the voters, levy and collect an additional twenty cents special tax for recreational purposes under Section 64.755, RSMo Supp. 1967, in addition to a tax levy of eighty cents for municipal purposes under Section 94.060, RSMo 1959, and twenty cents for park purposes under Section 90.500, RSMo Supp. 1967.

Honorable A. Basey Vanlandingham

The foregoing opinion, which I hereby approve, was prepared by my assistant Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Enclosure:
OP.No. 102
6-29-62, Hughes

CONFLICT OF INTEREST:
CIRCUIT CLERK:

Entering into a contract of employment by the Circuit Clerk with a bank where the Circuit Clerk's account is on deposit is a violation of Section 105.495, RSMo Cum. Supp. 1967, a section of the conflict of interest law.

OPINION NO. 145

June 19, 1969

Honorable P. Wayne Kuhlman
Assistant Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068



Dear Mr. Kuhlman:

This is in response to your request for an official opinion on the question whether it would be a conflict of interest for the Circuit Clerk to accept a part-time position with a bank where the Circuit Clerk's account is on deposit.

Our Supreme Court has recognized the right of the Circuit Clerk to select the banks which will serve as depositories for the funds entrusted to his care. This was done in State ex rel Ridge vs. Shoemaker, 212 S.W. 1, 4 where the court stated:

"* * *The defendant Shoemaker, under the law as enunciated by this court, had the right to deposit the moneys received by him from Hochland in the banks aforesaid in his name as clerk.* * *"

The purpose of the conflict of interest law is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on an official's decision. Section 105.495, RSMo Cum. Supp. 1967, provides:

"No officer or employee of an agency shall enter into any private business transaction with any person or entity that has a matter pending or to be pending upon which the officer or employee is or will be called upon to render a decision or pass judgment. If any officer or employee is already engaged in the business transaction at the time that a matter arises, he shall be disqualified from rendering

Honorable P. Wayne Kuhlman

any decision or passing any judgment upon the same. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or confinement for not more than one year, or both."

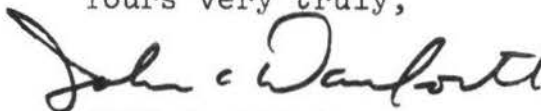
A contract of employment entered into between the Circuit Clerk and the bank would constitute a "private business transaction." Moreover, this private transaction would be directly related to "a matter pending or to be pending upon which the 'circuit clerk' is or will be called upon to render an opinion or pass judgment." The Circuit Clerk will be called upon to decide which bank is to serve as the depository for his official funds. In such circumstances, the execution of a contract of employment between the Circuit Clerk and the bank is a private business transaction entered into while the Clerk has a matter pending which requires him to render a decision or pass judgment.

CONCLUSION

It is the opinion of this office that entering into a contract of employment by the Circuit Clerk with a bank where the Circuit Clerk's account is on deposit is a violation of Section 105.495, RSMo Cum. Supp. 1967, a section of the conflict of interest law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

OPINION NO. ¹⁴⁶~~134~~
Answer by letter (Burns)

February 18, 1969



Honorable Lowell McCuskey
Prosecuting Attorney
Osage County
Linn, Missouri 65051

Dear Lowell:

We are enclosing an official opinion No. 97
rendered August 23, 1943 to H. Calvin Wilson which
we believe answers the question contained in your
recent opinion request.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure No. 97, Wilson, 8/23/43

SCHOOLS:
JUNIOR COLLEGE DISTRICT:
ELECTIONS:



Section 178.840, RSMo. Supp 1967, does not permit, authorize or direct the Junior College District of Metropolitan Kansas City, Missouri, to hold an election on the first Tuesday in April 1969, for the election of a trustee.

OPINION NO. 147

February 28, 1969

Honorable Harold L. Holliday
Representative, 14th District
2907 Cleveland
Kansas City, Missouri 64128

Dear Representative Holliday:

This official opinion is issued in response to your request for a ruling contained in your letter dated February 18, 1969. The question presented by the enclosure to your letter is:

"Do the provisions of R. S. Mo. 178.840 permit, authorize or direct the Junior College District [Metropolitan Kansas City, Missouri] to hold an election on the first Tuesday in April, that is April 1, 1969, for the election of a trustee from the School District of Kansas City, Missouri, to succeed the trustee whose term would otherwise have expired in November, 1968 had the new law, [Section 162.492, RSMo Supp. 1967] which has now been declared unconstitutional by the said Circuit Court, [16th Judicial Circuit, Judge Richard C. Jensen] not been enacted?"

In substance the facts as set forth in the statement enclosed with your letter are as follows: The Junior College District of Metropolitan Kansas City, Missouri, is a junior college district organized and existing under Revised Statutes of Missouri, Sections 178.770 through 178.890, which sections were first enacted in 1961. There are eight component school districts in the junior college district. The Board of Trustees of the district consists of six members, three of whom are elected from the School District of Kansas City, Missouri, and three from the remaining seven component school districts.

Prior to 1968, the School District of Kansas City, Missouri held biennial elections in even numbered years on the day provided for general elections, being the first Tuesday after the first Monday in November of even numbered years as provided by Section 162.481,

Honorable Harold L. Holliday

RSMo 1959. The junior college district held elections for members of its Board of Trustees from the School District of Kansas City, Missouri at the same time as such school district held its elections for members of its board of education.

In 1967, House Committee Substitute for House Bill No. 425 was enacted by the Seventy-Fourth General Assembly of the State of Missouri. This new statute had the effect of repealing Section 162.481, RSMo 1959, as it had previously applied to the School District of Kansas City, Missouri, and substituted new procedures for elections in this district as set forth in Section 162.492, RSMo Supp. 1967. Paragraph 3 of this section provides in pertinent part as follows:

"3. No elections of school directors shall be held in 1968. Thereafter school elections shall be held on the first Tuesday in April in each odd-numbered year, beginning in 1969. . . ."

We understand that in compliance with the new law, the School District of Kansas City, Missouri did not hold an election in 1968. Likewise, no election was held in 1968 for the election of a successor to the trustee of the junior college district whose term would otherwise have expired in November, 1968. It was the position of both the school district and the junior college district that an election would be held on the first Tuesday in April of 1969 for the purpose of electing members of the board of education and a member of the junior college board of trustees.

On January 21, 1969, Judge Richard C. Jensen of the Circuit Court of Missouri, Sixteenth Judicial Circuit, issued an order and entered judgment declaring Section 162.492, RSMo Supp. 1967 and related sections void, illegal, unconstitutional, and of no effect. Furthermore, the court enjoined the Kansas City Board of Election Commissioners and the Jackson County Board of Election Commissioners from taking any action pursuant to Section 162.492, Revised Statutes of Missouri, designed to accomplish the election of directors of the Kansas City Missouri school district. The court further enjoined the secretary of the Kansas City school district from accepting any filings of candidates for membership on the board and declared void any such filings theretofore made by prospective candidates. It is understood that a motion for a new trial in this case is pending in Judge Jensen's court.

On February 6, 1969, the Board of Directors of the Kansas City school district approved the recommendation of its secretary that a special election be called on April 1, 1969, for the purpose of submitting to the voters a proposal to increase the annual rate of taxation beyond the rate authorized by the Constitution of Missouri for school district purposes without voter approval. Thus, it is expected that the school district of Kansas City will hold an election

Honorable Harold L. Holliday

April 1, 1969, being the first Tuesday in April, for the special purpose of submitting to the voters a proposition to increase the school district's tax levy.

Section 178.840, RSMo Supp. 1967, sets forth the statutory provisions relating to the holding of elections by junior college districts including the Junior College District of Metropolitan Kansas City, Missouri.

Subsection 1 of this section states:

". . . Regular elections in junior college districts shall be held at the following times:

"(1) If a component district holds its elections on the first Tuesday after the first Monday in April in the years propositions must be voted upon in the junior college district, then elections in the junior college district shall be held at that time in each component district.

"(2) In all other junior college districts elections shall be held on the first Tuesday in April in the years propositions must be voted upon."

Subsection 2 of this section states:

"Elections in junior college districts shall be conducted as provided in subsection 2 of section 178.810, except that in any junior college district wherein by subdivision (2) of subsection 1 elections are held on the first Tuesday in April and all trustees are not to be elected at large, no election shall be held in a component district solely for the purpose of electing trustees of the junior college district and any trustee elected from such a component district whose term would normally expire in a year in which no regular school district election would be held in the component district shall continue to hold office until the next regular election in the component district at which time his successor shall be elected for a term of six years. . . ." (Emphasis supplied)

Subdivision (1) of subsection 1 of Section 178.840, RSMo Supp. 1967, is applicable to junior college districts in which a component district holds its elections on the first Tuesday after the first Monday in April. This provision does not apply to the Kansas City school district as a component district under the law which was ruled

Honorable Harold L. Holliday

unconstitutional because such law provides for the election to be held on the first Tuesday in April rather than the first Tuesday after the first Monday in April. Likewise, this subdivision would not apply under the law as it existed before the 1967 amendment because that statute provides for elections in November. Accordingly, the provisions of subdivision (2) of subsection 1 of Section 178.840, RSMo Supp. 1967, apply to the Junior College District of Metropolitan Kansas City, Missouri.

Subsection 2 of the section contains an exception to the rule that elections will be held on the first Tuesday in April by providing that no elections shall be held solely for the purpose of electing trustees of the junior college district and any trustee elected from such a component district whose term would normally expire in a year in which no regular school district election would be held in the component district shall continue to hold office until the next regular election in the component district.

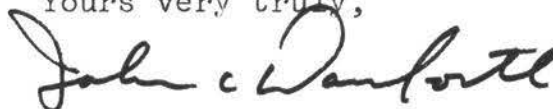
The facts indicate that no regular Kansas City school district election is now scheduled to be held during the year and pursuant to the statutory provision all trustees of the junior college district are to hold office until the next regular election in this component district.

CONCLUSION

It is the opinion of this office that Section 178.840, RSMo Supp. 1967, does not permit, authorize or direct the Junior College District of Metropolitan Kansas City, Missouri to hold an election on the first Tuesday in April 1969, for the election of a trustee.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CIVIL DEFENSE:
MILEAGE:
EXPENSES:

The Boone County Court, in the exercise of its control of the fiscal affairs of the County has authority to reimburse the County Civil De-

fense Director for all actual and necessary travel expenses incurred in the performance of public duties, which would include travel to attend civil defense conferences outside the political subdivision and outside the State of Missouri.

OPINION NO. 149

July 1, 1969

Honorable Frank Conley
Prosecuting Attorney
Boone County Court House
Columbia, Missouri 65201



Dear Mr. Conley:

This is in reply to your request for an official opinion as to the legality of Boone County's reimbursing its Civil Defense Director for travel expenses incurred in attending a civil defense conference outside the political subdivision and outside the State of Missouri. We assume that provision is made for such reimbursement of expenses in the county's annual budget.

Boone County was directed to establish a Civil Defense organization under Section 44.080, RSMo Supp. 1967, and in this connection it was authorized to expend funds in the administration of such a program.

"1. Each [county] . . . of this state shall establish a local organization for disaster planning in accordance with the state survival plan and program. The . . . [county court] shall appoint a coordinator who shall have direct responsibility for the organization, administration and operation of the local disaster planning for civil defense, subject to the direction and control of the . . . [county court]. Each local organization for disaster planning shall be responsible for the performance of civil defense functions within the territorial limits of its political subdivision, and may conduct these functions outside of the territorial

Honorable Frank Conley

limits as may be required pursuant to the provisions of this law.

"2. In carrying out the provisions of this law, each political subdivision may:

"(1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials and supplies for civil defense purposes, provide for the health and safety of persons, including emergency assistance to victims of any enemy attack; the safety of property, and direct and coordinate the development of disaster plans and programs in accordance with the policies and plans of the federal and state disaster and emergency planning;

"(2) Appoint, provide, or remove rescue teams, auxiliary fire and police personnel and other emergency operating teams, units or personnel who may serve without compensation;" (Section 44.080, RSMo Cum. Supp. 1967)

The county courts are empowered by law to manage the fiscal affairs of the county.

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; . . ." (Section 50.160, RSMo 1959; emphasis added)

One adjunct of this power has been characterized as the:

". . . discretionary quasi-legislative function and duty, State ex rel Dietrich v. Daves, 315 Mo. 701, 287 S.W. 430, of determining the necessity and amount of expenditures not otherwise specifically provided for by statute. . . ." (Miller v. Webster County, 228 S.W.2d 706, 708 (Div. 2, 1950))

The statute pertaining to county civil defense organizations does not in terms provide for reimbursement of the director's travel expenses, but it is nevertheless our opinion that the Boone County Court could properly determine that the expenses incurred in the

Honorable Frank Conley

trip to Miami Beach were ". . . bona fide, reasonable, and actual expenditures for indispensable expenses of this office . . ."
(Rinehart v. Howell County, 153 S.W.2d 381, 382 (Div. 2, 1941)).

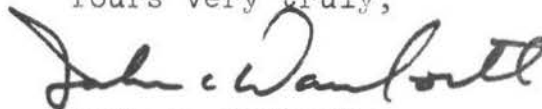
We believe that the test employed by the county court in reaching this determination should be the practical benefit of the National Conference to the Boone County Civil Defense Program. If the primary purpose of attending the Conference was to gain information clearly applicable or of definite utility to the present performance of the director's duties, then we feel the county court could allow reimbursement. However, if there is only a long term general benefit to the particular director in attending the Conference, then the county court might properly, in our view, decline to make the reimbursement.

CONCLUSION

It is the opinion of this office that the Boone County Court, in the exercise of its control of the fiscal affairs of the County has authority to reimburse the County Civil Defense Director for all actual and necessary travel expenses incurred in the performance of public duties, which would include travel to attend civil defense conferences outside the political subdivision and outside the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,



JOHN C. DANFORTH
Attorney General

September 5, 1969

Answered by Letter - Mansur
OPINION LETTER NO. 152

Honorable Dennis C. Brewer
Prosecuting Attorney
County of Perry
Perryville, Missouri 63775

Dear Mr. Brewer:

This is in response to your letter as follows:

"We have had some difficulty in Perry County in determining what the present rule is regarding whether a farm wagon is to be registered as a motor vehicle trailer. According to Attorney General Rule No. 96 given January 21, 1955 farm wagons drawn by farm tractors on public highways, are not required to be registered as either motor vehicles or or motor vehicle trailer. However, Rule No. 48 given December 9, 1957 says that farm trailers used exculsively in hauling farm products and other property between farm and town on public highways are not exempt from the requirements of Chapter 301 and are required to register and display a license plate thereon. I have not been able to determine where the difference lies between farm wagons and trailers since both may be of approximately the same size and carry the same load. There is

Honorable Dennis C. Brewer

also the question whether farm wagons need to be licensed if they are to pull loads behind pick-up trucks. The second major problem then is if the farm wagons are required to be licensed what requirements are to be enforced regarding the inspection laws especially tail lights and turn signals. Most farm tractors and trailers or farm wagons do not have facilities for hooking up any form of flashing light or electrical light on the back end of the wagon or trailer."

We enclose, herewith, a copy of Opinion No. 96 issued by this office on January 21, 1955. In this opinion, we held that a farm wagon drawn by a farm truck on a public highway is not required to be registered or licensed as a "motor vehicle" or "motor vehicle trailer".

We are enclosing, herewith, a copy of Opinion No. 48 issued by this office on December 9, 1957. In this opinion, it was held that a trailer pulled by a farm tractor on a public highway is required to be registered and licensed as such. It also stated that a farm wagon pulled by a farm tractor is not required to be registered or licensed.

In each of the above opinions, reference was made to an opinion issued to Max B. Benne, Prosecuting Attorney, Atchinson County, Missouri, dated April 20, 1954, a copy of which we enclose herewith. In this opinion, it was held that a metal or rubber tired farm wagon drawn on highways by farm tractors is not required to be registered and licensed because it was not designed primarily for use upon the highways.

We believe if you study these opinions, you will find the distinction made between a trailer and a farm wagon and the reasons why a farm wagon does not have to be registered and licensed.

The fact that a farm wagon is pulled by a farm tractor does not exempt it from displaying lights when traveling on a public highway. Section 304.460 RSMo 1959 requires all vehicles including agricultural machinery or implements to exhibit lights during the period lights are required.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 96, 1-21-55
Whitlow
Op. No. 48, 12-9-57, Keller
Op. No. 7, 4-20-54, Benne

May 2, 1969

Opinion Letter No. 153

Honorable Robert L. Prange
State Senator, 14th District
12714 Bellefontaine Road
St. Louis, Missouri 63138



Dear Senator Prange:

This is in response to your letter of February 20, 1969, in which you raised the following questions:

"Is it legally permissible for teachers as a group by their elected representatives to issue sanctions against a school board in Missouri?

"Is it legally permissible for a board to adopt the policy as shown in the attached policy of a school board?"

Your first question asks whether it is legally permissible for teachers as a group by their elected representatives to issue sanctions against a school board in Missouri?

We assume your reference to sanctions is to the copy of Professional Sanctions of the St. Louis Suburban Teachers Association; therefore the conclusions drawn by the office will reflect only on such sanctions which have evidently been invoked by the Community Teachers Association, to wit:

"Level I: Sanctions

"A. Formal statement of local sanctions made by the CTA to the Board of Education.

"B. Curtailment or suspension of non-teaching

Honorable Robert L. Prange

assignments for which there is no direct remuneration.

"C. Public notification of censure made through distribution of printed statements, use of radio and television, purchase of newspaper advertising space, and public meetings.

"Description of SLSTA Sanctions

"Level I:

"A. A formal statement shall be made to all concerned parties that SLSTA sanctions have been invoked.

"B. All SLSTA members shall be notified of the application of sanctions and reason for that action.

"C. SLSTA shall revoke placement services and all activities in assisting said district in the employment of educational personnel.

"D. SLSTA shall refuse information compiled or available through SLSTA facilities, unless local CTA officers request the release of certain materials.

"E. SLSTA shall cancel all services normally accorded to said school district.

"F. Information concerning existing conditions in the local school district shall be released to all local news media."

The foregoing standards promulgated by the Community Teachers Association are amplified in the letter of S. Dean Brown, President of the Hazelwood Community Teachers Association, to wit:

"These sanctions shall be lifted when:

"a. The Board accepts the report of the factfinding committee and acts favorably on its recommendations. This would include

Honorable Robert L. Prange

a written statement that contracts will be rewritten if additional state funds become available.

"b. The Board acts in good faith in the discussion with the CTA of salary schedule, 1970-71.

"c. Assurance is given that all pertinent materials and information be made available to the CTA Professional Discussion Team at the earliest opportunity.

"d. The Policy in Regard to Professional Discussion and Understanding has been jointly revised to correct apparent lack of clarity revealed in actions of 1968-69.

"e. The Board officially recognizes the professional training and standing of the instructional staff and agree to work with the staff for the general improvement of education program in the Hazelwood District."

The exact form the action, or inaction, contemplated by the Community Teachers Association is to take under their term of "sanction" is vague. Level I, sanction (A) appears to be nothing more than a filing of a statement with the Board of Education of the Association's "sanctions". Level I, sanction (C) apparently contemplates notification to the news media that "sanctions" have been issued against a Board of Education and are on the surface protected First Amendment rights. This "sanction" would have legal implications only to the extent that libel and slander on the part of the Association become evident.

A problem does arise, however, with Level I, sanction (B). This "sanction" talks of the "curtailment or suspension of non-teaching assignments for which there is no direct remuneration". An immediate problem here would be the nature of such "non-teaching assignments" in relation to the contract of an individual teacher. If the teaching contract covered the non-teaching assignment which the Association contemplates curtailing, obviously such action would be improper. Additionally, if the non-teaching assignment is a "rule or regulation" of the Board of Education, and was explained as such to the individual teacher before his contract was signed, said rule or regulation should be considered incorporated into the teaching contract:

Honorable Robert L. Prange

"SECTION 168.121, RSMo Supp. 1967:

" * * * The faithful execution of the rules and regulations furnished by the board shall be considered as part of the contract if the rules and regulations are furnished to the teacher by the board when the contract is made. * * * "
(Emphasis added)

Thus, to the extent that sanction (B) results in a curtailment of a contract obligation, by an individual teacher, the action would be improper.

It would appear, however, that the mere issuing of sanctions by a teachers' organization would not give statutory authority to a board of education to take action against an individual teacher; only when a teacher fails or refuses to comply with his contract or the rules and regulations of the board may a board act:

"SECTION 168.121, RSMo Supp. 1967:

" * * * If the teacher fails or refuses to comply with the terms of the contract or to execute the rules and regulations of the board, the board may refuse to pay the teacher, after due notice in writing is given by order of the board, until compliance therewith is rendered. * * * "

Thus, as can be seen, the contract relationship is between a board of education and an individual teacher, and only when the individual teacher fails to comply with his contract or the rules and regulations of the board does the board find statutory authority to act. In the "description of SLSTA sanctions" mention is made that "SLSTA shall cancel all sources normally accorded to said school district". In the rather vague context involved, we assume that the services referred to are not services to be performed under a contract with a school board and the SLSTA, and thus are gratuitous services which the SLSTA may cancel at its discretion.

The reference in the letter of Mr. Brown, President of the Hazelwood Community Teachers Association, as to the actions the Board must take before sanctions are to be lifted may at best be viewed as recommendations to the Board, which the Board may entertain at its discretion. (Opinion of the Attorney General, Prange, 12/12/68, copy of which is enclosed.)

Honorable Robert L. Prange

This office reaches the conclusion, then, that the issuing of Level I sanctions by the Hazelwood Community Teachers Association is legally permissible; however, to the extent that the implementation of such "sanctions" by an individual teacher would result in the failure to perform under his contract, said action would be unlawful.

II

Your second question asks whether it is legally permissible for a school board to adopt the policy as shown in the attached policy of a school board? We assume that your reference to "policy" is to the policy of the Hazelwood School District in regard to professional discussion and understanding, and the conclusions drawn by this office will reflect only on said policies and understanding which have evidently been set out in writing by the Board of Education of the Hazelwood School District.

The agreement states on Page 2, under the heading "Recognition" that:

"The Board of Education recognizes the Hazelwood Community Teachers Association as the representative of the professional staff for the purpose of discussing and arriving at understanding on matters concerning the improvement and development of the educational program, salary, welfare conditions, working conditions, and other areas of mutual concern. * * *

(Emphasis ours)

The Board of Education, however, has no statutory authority to deal with the C.T.A. as a bargaining representative for individual teachers which make up the membership of the C.T.A., in light of Section 105.510, RSMo Supp. 1967:

"Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing * * *

(Emphasis ours)

The relevant portion underlined quite obviously excludes school

Honorable Robert L. Prange

teachers from the class of state employees which may designate a bargaining agent.

Therefore, to the end that the "policy" attempts to establish the Hazelwood Community Teachers Association as a bargaining agent it is a nullity.

This is not to say, however, that the School Board may not consider group-teacher proposals. By former opinion of this office, Attorney General's Opinion No. 276, Prange, 12/12/68, this office has held that a school board may consider such group-teacher proposals, and may act favorably upon said proposals to the extent they do not conflict with applicable law.

To the extent therefore that the "policy" of the School Board herein is mere recognition by the Board that the procedures outlined are recommendations and are to be given consideration, it would appear proper. If the Board has signed this memorandum with the intent to bind itself to these procedures, however, it has acted without statutory authority. Pursuant to Section 168.121, supra, when read with Section 105.51, supra, the School Board can only bind itself contractually with individual teachers, and thus cannot bind itself to a contract with a teacher representative group.

This office reaches the conclusion then that the Hazelwood Board of Education may only enter into contracts with individual teachers and is without authority to enter into group contractual agreements with the Community Teachers Association.

It is the opinion of this office, therefore:

(1) that the issuing of "Level I sanctions" by the Hazelwood Community Teachers Association is legally permissible; however, to the extent that the implementation of said "sanctions" by an individual teacher would result in the failure to perform under his contract, said action would be unlawful.

(2) that the Hazelwood Board of Education may only enter into contracts with individual teachers and is therefore without authority to enter into a group binding agreement with the Community Teachers Association.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 276
Prange, 12/12/68

COUNTY BUDGET LAW:
COUNTY FAIRS:
TAXES:
ELECTIONS:

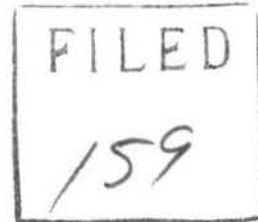
Revenues under section 262.500 to 262.540 RSMo 1959, are under the Budget Law. These revenues must be divided into separate funds--one for premiums which is not a revolving fund. The remaining fund may be used for premiums or for fairgrounds

unless the latter use is required in the tax election proposition. Surplus from any year may be used only for premiums or advertising.

OPINION NO. 159

August 7, 1969

Honorable John C. Ryan
State Senator
Senate Post Office
Capitol Building
Jefferson City, Missouri 65101



Dear Senator Ryan:

This is in answer to your letter of recent date in which you requested an official opinion from this office concerning the following matters:

1. Must the revenue collected under the provisions of Sections 262.500 to 262.540 RSMo 1959, for the purpose of providing support as stated in these provisions for district or county fairs, be considered subject to the County Budget Law, Sections 50.525 to 50.745 RSMo 1959 and Cum. Supp. 1967, and if they must be so considered, within which category, if any, should they be placed?
2. Must such revenue as is collected under the provisions of Sections 262.500 to 262.540, RSMo 1959, be divided between two different funds upon receipt, or may these revenues be carried as a single, county fair fund?
3. Is the fund in which the revenues so collected are placed a revolving fund?
4. How are the funds received under the provisions of Sections 262.500 to 262.540, RSMo 1959, to be allocated?
 - a. May the county court exercise its discretion in the allocation of funds for building and for premiums in the year the funds are received?
 - b. May funds allocated for premiums in one year be allocated to maintenance and improvement of fair grounds the following year?

Honorable John C. Ryan

I. Applicability of the County Budget Law.

Section 262.500 RSMo 1959 provides for the collection of a tax for the purpose of "encouraging, promoting and improving the livestock, poultry, agricultural, horticultural, mechanical fabrics and fine arts, products and articles of domestic industry, and the exhibition of such stock, poultry articles and commodities, as the district or county fair held in the county." This tax, when aggregated with other taxes levied by the county, may not exceed the constitutional limit, nor may it exceed two mills per dollar valuation. The levy is conditional also upon the presentation of a petition signed by a specified number of taxpayer-voters of the county, and upon the approval of the proposed tax levy at a special election called under the provisions of Section 262.530 RSMo 1959.

The disposition of the funds collected from the tax levy is controlled by the provisions of subsections 2 and 3 of section 262.500 and by sections 262.510 and 262.520 RSMo 1959. Under subsection 3 of section 262.500, the amount of the revenue from the tax levy not expended in any year is to be retained in a special fund for the purpose of section 262.500 in succeeding years. That is, they may be used for the purposes set forth in section 262.500 and for no other purposes, and they are to be retained by the county treasurer in a special fund. The treasurer must account for the receipt and expenditure of the revenue collected under sections 262.500 to 262.540 as provided in section 54.150 RSMo 1959.

The County Budget Law is comprised of sections 50.525 to 50.745 RSMo 1959 and RSMo Supp. 1967. Priorities in payments and classification of budget items are now provided by sections 50.540 RSMo Supp. 1967, and 50.550 RSMo.

Section 50.540 requires that the budget officer of the county receive "estimates of its requirements for expenditures and its corresponding revenues for the next budget year compared with the corresponding figures for the last completed fiscal year and estimated figures for the current fiscal year" from "each department, office, institution, commission or court of the county." "Revenue" is defined in section 50.527 RSMo Supp. 1967, as follows:

" . . . the ordinary or general revenue to be used for the current expenses of the county regardless of the source from which it is derived."

Moreover, the first sentence of section 50.550 states that:

"The annual budget shall present a complete financial plan for the ensuing budget year."

The purpose of the Budget Law has been said to be "to regulate the usual operations of the regular departments of government whose needs could be foreseen and planned" for the budget period. State ex. rel. Armentrout vs. Smith, 353 Mo. 486, 182 SW 2d 571 at 574 (1944). It is to compel the county to operate on a cash basis and not to obligate the county beyond its revenues. See State ex. rel. Strong vs. Cribb, 364 Mo. 1122, 273, SW 2d 246 (1954). Another function of the Budget Law is to give the public an opportunity to be certain that funds are

Honorable John C. Ryan

are being properly allocated and spent. This is suggested by the provision in section 50.540 subsection 5 for public hearings by the budget officer "before preparation of the budget document."

The all-inclusive nature of "revenue" as defined in the Budget Law, and the plain demand that all types of revenues and planned expenditures be accounted for in section 50.550, as well as the apparent purposes which that Budget Law is intended to carry out, compel the conclusion that the funds received under sections 262.500 to 262.540, no matter how restricted and closely accounted for these funds are under other statutory provisions, are nevertheless included within the Budget Law.

While there is no specific provision for a class comprising tax receipts from this special levy, the budget officer is free to provide for these funds under the appropriate heading which will make clear their purpose, origin and the special nature of the fund to which they are to be credited. The last sentence of section 50.550, "The county court may create other funds as are necessary from time to time" would seem to provide ample authority for such a procedure.

II. Disposition of Funds Received

The disposition of revenue received under the provisions of Sections 262.500 to 262.540 RSMo 1959 is controlled primarily by subsections 2 and 3 of section 262.500 and Sections 262.510 and 262.520. Subsection 2 of Section 262.500 states that after the special tax is levied,

" . . . one-half of which levy shall be set aside by the county court and distributed ratably to the exhibitors of the public fairs held in the county, for the purpose of paying premiums to exhibitors of (sic) the articles and commodities in Section 262.500 to 262.540. The other one-half of which levy, in the judgment and discretion of the court may be used for the purpose of purchasing grounds or erecting suitable building for such fair purposes; but if the grounds for the purposes are owned by the county, or leased or otherwise secured or obtained for such uses, then the other one-half may be used by the court in erecting such building. If it is the discretion and judgment of the court that the other one-half of the levy be not used for grounds or buildings then the whole of the levy may be used for paying such premiums. If the petition for the election asks that one-half of the levy be devoted to acquiring of lands or erecting of buildings, then the proposition submitted shall contain provisions for such devotion; and if the majority favor the proposition, then the court shall so expend and use the proceeds of the one-half of the levy." (Emphasis added).

The above subsection requires that there be two separate funds between which the revenue received from the special tax levy must be divided. One-half of the funds must be put in a separate mandatory premium fund. The remaining half may be placed in a fairgrounds fund. The use of the latter fund depends upon the language of the proposition put to the voters in the election under Sections 262.500 and 262.530. If the proposition states that one-half of the revenue shall be placed in a fund for premiums, and one-half of the revenue shall be placed in a fund which may be used for premiums, or for the acquisition or the improvement of fairgrounds, the county court retains its discretion as to the allocation of the revenue in the second fund. However, if the proposition, following the language of the petition which initiated the process leading up to the special election, states that the second fund will be used for acquiring lands or erecting buildings, then the county court retains no discretion as to the allocation or use of that fund, either.

The use of surplus remaining in the hands of the county court after the holding of the fair is controlled by subsection 3 of section 262.500; which provides as follows:

"If the surplus remaining out of the proceeds of any levy made under sections 262.500 to 262.540, in any year, in the hands of the county treasurer shall constitute a fund for the purposes of sections 262.500 to 262.540, and may be used either as premiums offered or advertising for exhibits to be made under any provision of sections 262.500 to 262.540."

The money remaining on hand is placed in a fund which may be used either for premiums or for advertising. The listing of alternative uses rather than a general statement as to the county court's discretion in the allocation of this surplus between advertising and the other uses permitted under subsection. 2 suggests that no other use may be served by this surplus fund. Thus, without regard to the required or discretionary use to which the revenue was to be put originally the surplus may be used only for advertising or premiums. Moreover, the general language of this third subsection of Section 262.500 in conjunction with the apparent intention of the legislature, expressed in the provisions of Section 262.500, to favor the use of funds for premiums, makes it seem clear that the amount in the surplus fund may not be credited to the mandatory premium fund for the purpose of determining the amount to come into that fund from current tax revenues. That is, the funds to be set up under subsection 2. Section 262.500 are not revolving funds.

CONCLUSION

I. It is the opinion of this office that revenue collected under the provisions of Sections 262.500 to 262.540 RSMo 1959, relating to public fairs held in a county is subject to the County Budget Law.

II. It is further the opinion of this office with regard to such revenue that:

A. The revenue must be divided between two funds in the year collected. One of these funds, contain-

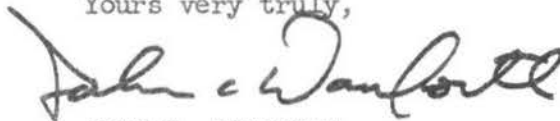
Honorable John C. Ryan

ing one-half of the total revenue collected under the tax levy, must be used for premiums.

- B. Neither fund under the provisions of subsection 2, Section 262.500 is a revolving fund.
- C. The second fund, not required for premiums under the provisions of subsection 2, Section 262.500 may be used for any purpose set forth in subsection 2 in the discretion of the county court. However, if the proposition submitted to the voters in the election under subsection 1, Section 262.500 and Section 262.530 provides that this second fund shall be used for the acquisition or the improvement of fairgrounds, then the use of this fund shall be limited to those purposes, and the county court shall have no further discretion as to its use.
- D. The surplus remaining from any tax levy under the provisions of subsection 3, Section 262.500 must be used for advertising or for premiums. It may not be used for the acquisition or improvement of fairgrounds.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Dennis J. Tuchler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

DJT: mlz

Answer by letter-Nowotny

March 10, 1969

OPINION LETTER NO. 163

Honorable Eugene F. Mazzuca
State Representative
67th District
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Mazzuca:

This is in answer to your request for an opinion of this office concerning the question whether the paper used for advertising purposes in a newspaper is subject to sales tax.

The controlling provision of law is subdivision 7 of subsection 3 of Section 144.030, RSMo Supp. 1967, which specifically exempts from sales tax:

"Newsprint used in newspapers published for dissemination of news to the general public;"

The basic rule of statutory construction is to determine the intent of the legislature from the words used if possible; and to put upon the language, honestly and faithfully, its plain and rational meaning and to promote its object, and to give proper consideration to the manifest purpose of the statute, considered historically. A statute imposing a tax should be construed strictly against the taxing authority, while an exemption statute should be construed strictly against the person claiming the exemption. The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. *American Bridge Co. v. Smith*, 352 Mo. 616, 179 S.W.2d 12, 157 A.L.R. 798, cert. den. 323 U.S. 712.

Newsprint is defined by Webster's Third New International Dictionary as:

Honorable Eugene F. Mazzuca

"cheap machine-finished paper made chiefly from groundwood with a little chemical pulp to give strength and used mostly for newspapers"

Newspaper is defined by Webster's Third New International Dictionary as:

"1: a paper that is printed and distributed daily, weekly, or at some other regular and usu. short interval and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest * * *"

The plain meaning of the exemption provision is that newsprint that is used to publish newspapers is exempt from taxation. The remainder of the provision merely states the newspapers which qualify for the exemption, that is newspapers which are published for dissemination of news to the general public. Therefore, any such "newspaper" qualifies for the exemption.

It is common knowledge, as well as being defined so in Webster's, that a newspaper, besides printing news, also contains non-news information, such as comics, editorials, columns, historical notes, and miscellaneous items such as crossword puzzles, etc., as well as advertising. The fact remains that it is a "newspaper" that is published, in spite of the fact that the "newspaper" contains such non-news items.

We do not in any way interpret the exemption to only apply to newsprint used for the actual printing of straight news. It is our opinion that the exemption clearly applies to all of a newspaper as long as the newspaper is published for dissemination of news to the general public.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Park

March 10, 1969

OPINION LETTER NO. 164

Honorable Eugene F. Mazzuca
Representative, 67th District
City of St. Louis
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Mazzuca:

This will acknowledge receipt of your letter dated February 21, 1969, requesting an opinion on several matters all relating to the ownership and use of Catholic church school property.

More particularly, you inquire:

"* * *DOES THE ARCHDIOCESE LEADERS HAVE THE AUTHORITY TO CLOSE ANY SCHOOL BUILT AND PAID FOR COMPLETELY BY INDIVIDUAL PARISHONERS AND NEIGHBORHOOD AND OPERATED FINANCIALLY AND COMPLETELY WITHOUT ANY INTEREST FREE ASSISTANCE FROM THE ARCHDIOCESE?* * *"

Also, you ask:

"* * *WHO OWNS THE INDIVIDUAL CHURCH, SCHOOL AND PARISH PROPERTIES? The individual parish-
oners who have completely bought, built and maintained these properties or the archdioces
leadership who have been appointed by the Pope
as a result of the religious structure of rank?*" * *"

Among the statutory duties assigned to the Attorney General is that of rendering opinions to certain public officials concerning their official duties. Section 27.040, RSMo 1959, states:

Honorable Eugene F. Mazzuca

"When required, he [Attorney General] shall give his opinion, in writing, * * * to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, commissioner of education, grain warehouse commissioner, superintendent of insurance, the state finance commissioners, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

As a general rule, the duty of the Attorney General is to advise, upon request, state officers and various state department heads and other officials as to legal questions concerning their official conduct, and ordinarily the giving of an opinion will be refused except as provided for by constitutional or statutory requirements. 7 C.J.S., Attorney General, Section 6.

Likewise, this office has previously taken the position that the Attorney General is not permitted by Section 27.040, RSMo 1959, to give advice to private individuals. Opinion Attorney General No. 15, Cave, 4-10-50.

The questions raised in your letter relative to the ownership and use of Catholic church properties appear to be private rather than public matters. For this reason, an opinion on the several questions raised in your letter cannot be rendered.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 15
4-10-50, Cave

SCHOOLS:
SCHOOL BOARDS:

(1) School districts may form and contribute funds to a voluntary association consisting of several school districts, provided that the activities of the asso-

ciation are within the powers of the participating school districts.

(2) An association so formed may employ and compensate a person with the title of executive director, out of funds contributed by the participating districts.

(3) The said association may take part in activities in support of or in opposition to legislation affecting the participating school districts.

OPINION NO. 167

July 10, 1969

Honorable Robert H. Branom
State Representative
Room #407B - 35th District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Branom:

This official opinion is issued in response to your request of recent date in which you ask the following questions:

1. Whether there is legal authority permitting school districts in St. Louis County to join and contribute to an organization known as the Cooperating School Districts for the St. Louis Suburban Area;

2. Whether such an organization "can use school funds for the salary of an executive director;" and

3. Whether the organization "can take part in legislative action on specific legislative proposals."

It is convenient to consider the third question first. Such question is as to the validity of expenditure of school funds for legislative activities.

Although the earlier cases showed some diversity of opinion, the more recent cases hold that a local governmental unit is not prohibited from spending money for the purpose of supporting or opposing legislative proposals affecting its interest. The cases are collected in 15 McQuillan, Municipal Corporations (3d. ed.), Section 39.23. No Missouri cases are cited.

Honorable Robert H. Branom

In Reilly v. Ozzard, 33 N.J. 529, 166 A. 2d 360 (1960), the Supreme Court of New Jersey stated:

"That local government has the right to seek or to oppose legislation affecting its interests is settled. . . ."

In Hays v. City of Kalamazoo, 316 Mich. 443, 25 NW 2d 787 (1947), the Supreme Court of Michigan held that a city could pay dues to an organization known as the Michigan Municipal League, which concerned itself with legislative matters and other matters of interest to cities.

In Schuerman v. State Board of Education, 284 Ky 556, 145 SW 2d 42 (1940) the Court of Appeals of Kentucky held that a school district could pay dues to the Kentucky School Boards Association, which had the purpose, among others, to "Work for educational legislation that will promote the best educational interests of the children of Kentucky." The case is particularly helpful here because Kentucky has a constitutional provision relating to school funds which is similar to Article IX, Section 5 of the Constitution of Missouri. (See below)

It is common knowledge that cities, counties and other local governmental units retain legislative representatives and sponsor legislative programs. Under current conditions these local units have important business with the legislature. We perceive no reason for distinguishing between municipalities and school districts. We are confident that the Missouri courts would follow the line of authorities just cited and would hold that a school district may engage in legislative activities without violating Article IX, Section 5, which provides that the state public school fund:

". . . shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

Since legislation may be of great importance in the establishment and maintenance of free public schools, the expenditure of school funds in relation to legislation affecting the school district is an expenditure for school purposes.

Your second question asks whether school districts can form and contribute to an association.

Since school districts may expend their funds in connection with legislation, they may combine and cooperate with other districts for this purpose.

Honorable Robert H. Branom

The cases of Hays v. City of Kalamazoo, and Schuerman v. State Board of Education, both cited above, are important with regard to this question. The former upheld a contribution to a municipal league by a city, and the latter dealt with a contribution to an association of school boards by a local school district. Both courts permitted the contributions, without express statutory authority for the establishment of the association.

The authority for cooperation is ever stronger in Missouri by reason of Section 70.220 RSMo which reads as follows:

"Any municipality or political subdivision of this state . . . may contract and cooperate with any other municipality or political subdivision. . . for a common service; provided that the subject and purposes of any such cooperative action made or entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. . . ."

The statute was adopted to implement Section 16 of Article VI, of the Constitution of Missouri, which contains similar language. Section 70.210(2) RSMo Supp. 1967, provides that a school district is a "political subdivision of the state" within the meaning of Section 70.220 and related sections of the statutes.

The formation of a voluntary association is an appropriate means for cooperation, particularly for districts limited in size and resources. We see no reason, therefore, why school districts could not form such an association to carry on legislative activities and other activities which would be proper for the individual districts.

Your request does not indicate any purpose for the Cooperating School Districts of the St. Louis Suburban Area, other than for activities relating to legislation. We express no opinion as to the propriety of any other activities, except to observe that the association could engage in only such activities as would be within the powers of the individual districts.

Your third question asks whether the association can compensate an executive director.

Since the several districts have the authority to form a voluntary association for proper purposes within their powers, the association may employ and compensate persons in the pursuit of its objectives. There is no reason why the association could not give a person so employed the title of "Executive Director" or any other title deemed appropriate. The conferral of the title, of course, would not give him any authority either on behalf of the association or on behalf of the participating districts, except such as is

Honorable Robert H. Branom

specifically conferred upon him.

CONCLUSION

It is the opinion of this office that:

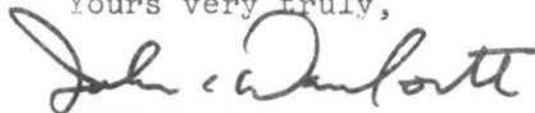
1. School districts may form and contribute funds to a voluntary association consisting of several school districts, provided that the activities of the association are within the powers of the participating school districts.

2. An association so formed may employ and compensate a person with the title of executive director, out of funds contributed by the participating districts.

3. The said association may take part in activities in support of or in opposition to legislation affecting the participating school districts.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

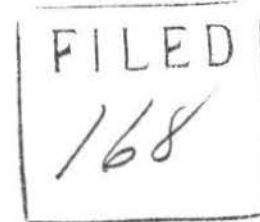
RESIDENCE:
KANSAS CITY AREA:
TRANSPORTATION DISTRICT:
AUTHORITY:

Residence requirements for a commissioner of the Kansas City Area Transportation District Authority as the representative of a particular county are met by a person who is legally

entitled to vote in such county. Voting residence depends on the intent of an individual and such intent is determined by his acts as well as his statements.

OPINION NO. 168

August 7, 1969



Honorable Carl D. Gum
Prosecuting Attorney
Cass County Court House
Harrisonville, Missouri 64701

Dear Mr. Gum:

This is in response to your request for an opinion from this office. The first question is as follows:

1. Is voting residence in a county sufficient to meet the residence requirements in Chapter 238, RSMo Cum. Supp. 1967, for a commissioner?

Chapter 238, RSMo Cum. Supp. 1967, provides for the establishment of the Kansas City Area Transportation District Authority pursuant to an inter-state compact between the states of Missouri and Kansas. The commissioners who make up the authority are charged with the planning and development of transportation facilities in an area which includes the Missouri counties of Cass, Clay, Jackson and Platte, and the Kansas counties of Johnson, Leavenworth and Wyandotte. Under Article V of the compact:

"The Authority shall consist of ten Commissioners, five of whom shall be resident voters of the state of Missouri and five of whom shall be resident voters of the state of Kansas. All Commissioners shall reside within the District, the Missouri members to be chosen by the State of Missouri and the Kansas members by the State of Kansas, in the manner and for the terms fixed by the Legislature of each State except as herein provided."

The appointment of the Missouri commissioners is controlled by Section 238.060, RSMo Cum. Supp. 1967, subsection 1, paragraphs (1) and (2):

"(1) There shall be five commissioners appointed from within the district established by the compact and at least three of said commissioners shall reside with the city of Kansas City, Missouri;

(2) Within thirty days after October 13, 1965, by majority vote of each county court from Cass, Clay, Jackson, and Platte counties there shall be submitted to the governor a panel of three qualified persons who reside in their respective counties and on each panel from Clay, Jackson and Platte counties at least one person shall reside within the city of Kansas City. The mayor of Kansas City, Missouri, with the approval of a majority of the members of the city council of the city of Kansas City shall submit to the governor a panel of three qualified persons who reside within the city of Kansas City. the governor within thirty days thereafter shall appoint with the advice and consent of the senate one commissioner from each panel so submitted; * * *

Section 238.070 provides:

"All commissioners so appointed shall be qualified voters of the state of Missouri and shall reside within the district established by the compact and within the county or city from which appointed. No commissioner shall have a direct or indirect financial interest in any property acquired by the Kansas City area transportation authority."

Thus, the commissioner must be a "voting resident" of Missouri and he must "reside" in the county from which he is chosen. In the case of Platte, Jackson and Clay counties, at least two of the three commissioners must reside also in Kansas City.

While "voting residence" has not been defined in the statute, the sufficiency of residence for the purpose of voting has been the subject of judicial decision. Domicile is sufficient in Missouri to allow a person to vote in the state even though he may set up a temporary residence elsewhere. Lankford v. Gebhart, 130 Mo. 621 (1895). In general, however, rules with regard to "voting residence", whether in the state or in a subdivision of the state, generally assure that the voter has a sufficient connection with the place where he votes to be concerned and informed.

Honorable Carl D. Gum

Hence, residence sufficient under the laws of Missouri to vote should assure a sufficient connection between a person and a community to allow the former to provide minimally informed and concerned participation by him in its affairs, and representation of its interests by him in a legislative or administrative agency.

The apparent purpose of the legislature in requiring that a commissioner "reside" in the county from which he is chosen is to provide for the most effective representation of the interests of the political units involved in the transportation district. The preference for residence in Kansas City on the part of at least three and possibly four commissioners merely reflects the probability that Kansas City will be most affected by the operations of the Authority. This in no way detracts from the purpose of giving all of the four counties adequate representation. If the residence of the commissioner is a mere technicality, reflecting only a tenuous connection with the county he represents, the purpose of the statutory requirement of "residence" is defeated. "Voting residence" would seem to satisfy the requirements of Section 238.070.

The second question of the opinion request is as follows:

2. If your answer to the preceding question is negative, is a voting residence alone sufficient to allow a person who has been appointed a commissioner to maintain the office or, if the person so appointed moves out of the county from which he was appointed, must such office be declared vacant?

We are unable to give an opinion on whether the commissioner in question is a legal resident voter in Cass County because that depends upon many factors that have not been determined or made known to us at this time.

Section 1.020, RSMo, provides rules for construing certain words used in the statutes and provides:

"9. 'Place of residence' means the place where the family of any person permanently resides in this state, and the place where any person having no family generally lodges;"

In Barrett v. Parks, 180 S.W.2d 665, the court held that the words "permanently reside" as used in the above statute are not used in the sense that "residence" may never be changed but that there exists no present intention to change it. It further held that one may not reside in more than one place for the purpose of voting and that conduct is an important factor in determining intention since actions speak louder than words and if there is a discrepancy between declarations of intention and acts, the declarations yield to the conclusion to be drawn from the acts.

Honorable Carl D. Gum

In State v. Mueller, 388 S.W.2d 53, the issue before the court was whether a person elected alderman from the 21st ward in the city of St. Louis was a resident of such ward at the time he was elected. He contended his legal residence was 3801 A Lee Street in the 21st ward, where he and his wife were registered to vote and where he had a furnished apartment above a drug store owned and operated by his brothers. Some time prior to the election, he bought a home located at 1632 Veronica Avenue in the 1st ward where he and his family lived and where he usually goes after work to eat and sleep. The court in discussing the question of intent stated that a person cannot live in one place and by force of imagination constitute some other place his place of abode; the actual residence controls and no formula which ignores the householder's good faith or lack of it, or the purpose for which his claim of domicile is made, or which facilitates the concealment of those factors, will satisfy the demands of the law. The court held that although residence is largely a matter of intention, it is not entirely a matter of intention and that intention when considered by itself separate and apart from evidence of some act or acts in conformity with such intention is never sufficient to establish the ultimate fact of residence. Then too, a person's testimony as to his intention is simply a statement designed to create evidence of it. As it must be accepted on faith, it should be received with caution; and when in conflict with the other evidence on the subject, ought always to be subordinated to it. Thus, the rule has evolved that where the behavior of the householder is at odds with his professed intent, the former will control - for actions speak louder than words.

The court held in the above case that Mueller was not a resident of the 21st ward and his voter registration from that address was improper; that since the residence requirement with respect to any public office is mandatory, the judgment of ouster by the trial court was proper.

The mere fact that this person may vote or be registered for voting in Cass County does not of itself establish legal voting residence in Cass County. It is also possible that he may vote in Cass County although legally speaking he may not be entitled to vote in that county - State v. Mueller, supra.

The fact that the statute under consideration does not expressly provide that a change of residence forfeits the office is not important. In State ex rel v. Donworth, 127 Mo. App. 377, the court held that when an alderman moved out of his ward he forfeited his office although the statute was silent about a forfeiture.

As heretofore stated, no definite opinion can be issued by this office as to whether the commissioner in question is, or is not, eligible for the office of commissioner of the Kansas City Transit Authority. This statement that he considers Cass County as his residence, and that he intends to vote in Cass County may, or may not, support his contention as to his legal residence

Honorable Carl D. Gum

depending upon other factors that must be considered. Consideration should be given as to where his personal property is assessed, whether he owns or sold his home in Cass County, whether he still maintains a place to eat and sleep in Cass County, whether his employment in Kansas City is for a definite period of time or merely temporary, whether he has purchased property in Kansas City and any other elements that should be considered in determining the legal residence.

CONCLUSION

It is the opinion of this office that the residence requirements for a commissioner of the Kansas City Area Transportation District Authority as the representative of a particular county are met by a person who is legally entitled to vote in such county. Voting residence depends on the intent of an individual and such intent is determined by his acts as well as his statements.

The foregoing opinion, which I hereby approve, has been prepared by my assistant Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SAFETY RESPONSIBILITY UNIT:
MOTOR VEHICLES:
ACCIDENT REPORTS:

The operator of a motor vehicle on the public highways who loses control and goes off the highway and causes damage to another's property in excess of \$100 must file a report under Section 303.040, RSMo 1959.

OPINION NO. 170

April 24, 1969



Honorable Gene Thompson
Prosecuting Attorney
Nodaway County
Court House
Maryville, Missouri 64468

Dear Mr. Thompson:

This is in answer to your request for an opinion of this office concerning the question whether the operator of a motor vehicle which runs off a public highway and causes death, injuries, or property damage on private property is required to file proof of financial responsibility under Chapter 303, RSMo. The facts of the accident are that the driver of the motor vehicle in question was violating certain traffic regulations on the public highways and when pursued by police officers the driver attempted to evade arrest and in doing so lost control of the motor vehicle, and said vehicle left the public highway, entered private property, and caused in excess of \$100 damage to another's property.

Section 303.040, RSMo 1959, requires the filing of a report with the Director of Revenue by persons involved in a motor vehicle accident. This section reads in part as follows:

"The operator of every motor vehicle which is in any manner involved in an accident within this state, upon the streets or highways thereof, in which any person is killed or injured or in which damage to property of any one person, including himself, in excess of one hundred dollars is sustained, shall within ten days after such accident report the matter in writing to the director.* * *"

Honorable Gene Thompson

After receipt of reports filed pursuant to Section 303.040 the Director of Revenue is required by Section 303.030, RSMo Supp. 1967, to take certain action within certain time limits based upon the information filed in the reports.

Therefore, the answer to your question depends on whether a report must be filed pursuant to Section 303.040. Such answer turns on whether the accident occurred upon the streets or highways of Missouri.

Street or highway is defined in Section 303.020(13), RSMo Supp. 1967, as:

"* * *the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."

The Supreme Court of Missouri in considering various provisions of the Motor Vehicle Safety Responsibility Law said in City of St. Louis v. Carpenter, Mo., 341 S.W.2d 786, 788, 87 A.L.R.2d 1219:

"[1] Statutes enacted for the protection of life and property, or which introduce some new regulation conducive to the public good, are considered remedial in nature and are generally given a liberal construction. . . .

"[2] The purpose of The Motor Vehicle Safety Responsibility Law is to protect the public from injury or damage by the operation of motor vehicles upon the public highways and to that extent it is remedial. . . . The Law necessarily provides for sanctions as a means of its enforcement.

"[3,4] Where a statute is both remedial and penal, remedial in one part while penal in another, it should be considered a remedial statute when enforcement of the remedy is sought and penal when enforcement of the penalty is sought. . . ."

We believe that the clear intent of the statute is to insure that damages caused by reckless and negligent operation of automobiles be recovered and persons causing damage be required to show financial responsibility before they are allowed to continue

Honorable Gene Thompson

driving and that, therefore, it should be liberally construed in determining whether an accident occurs on the highway when the car is negligently driven so as to go off the highway and cause damage on private property.

The term accident has been defined many times under the Workmen's Compensation Law. The Court in *Bauer v. Independent Stave Company*, Mo.App., 417 S.W.2d 693, 696 said:

"* * * To sustain this burden, the employee must not only show he suffered an injury, but additionally must show the injury resulted from an accident arising out of and in the course of his employment within the meaning of the Act. * * * An 'accident' under the law is 'an unexpected or unforeseen event happening suddenly and violently.' It is not the 'injury' itself, but the cause of the injury. The injury is the result produced by the accident and the cause of the injury must be accidental to be compensable.* * *"

The word accident as used in automobile liability policies requiring notice of any accident to be given to the insurer as a condition precedent to liability means an untoward or unforeseen occurrence in the operation of the automobile which results in injury to the person or property of another. *Ohio Casualty Ins. Co. v. Marr*, 10th C.C.A., 98 F.2d 973, 975. Such meaning to the term accident does not exclude an injury caused by negligence. *American Indemnity Co. v. Jamison*, Tex. Civil App., 62 S.W.2d 197, 198.

From the facts presented to us it appears clear that the damage occurred off the public highway but that the negligence or cause of the damage occurred on the public highway. See *Winford v. Barsi*, D.C.W.D.Mo., 92 F.Supp. 110; *Rogles v. United Rys. Co.*, Mo., 232 S.W. 93; *Dodson v. Maddox, et al*, 359 Mo. 742, 223 S.W.2d 434, and *Hay v. Ham*, Mo.App., 364 S.W.2d 118.

Therefore, it is our opinion that under Section 304.040 there was an accident upon the highways of Missouri in which there was property damage to another.

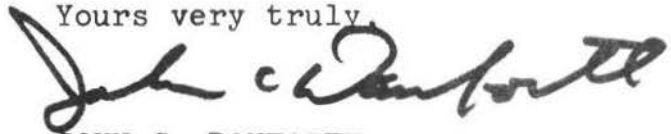
CONCLUSION

It is the opinion of this office that the operator of a motor vehicle on the public highways who loses control and goes off the highway and causes damage to another's property in excess of \$100 must file a report under Section 303.040, RSMo 1959.

Honorable Gene Thompson

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Answer by Letter (Nowotny)

December 5, 1969

OPINION LETTER NO. 172

Honorable E. J. Cantrell
Representative - 33rd District
3406 Airway
Overland, Missouri 63114



Dear Mr. Cantrell:

This letter is in response to your opinion request in which you ask concerning the authority of law enforcement officers to enter upon private property for the purpose of issuing summons without warrants. Upon further clarification, you advise that your question concerns situations where police officers are going onto private property to issue violations for failure to display city stickers. The provisions concerning such municipal vehicle license taxes are found in Section 301.340, RSMo 1959.

You have not indicated whether or not the situations concern automobiles located on or off private property; and, therefore, we will consider both possible situations.

Assuming that the vehicle is located upon private property, it is our view that it would be an unreasonable search for the officer to enter upon such private property without permission for the purpose of inspecting the vehicle and determining whether or not said vehicle had a city sticker.

In this respect we note that Professor Scurlock in 29 K.C.L.Rev. 1961, p. 242, "Searches and Seizures in Missouri" at p. 299 states:

"The protection of the guarantee against unreasonable searches and seizures is particularly thrown around the dwelling place, whether it is a mansion or a room in a boarding house. The 'curtilage' appears to be likewise protected, but

Honorable E. J. Cantrell

premises not within the 'curtilage' do not come within the meaning of the constitutional provisions. No warrant is needed to search fields and other lands not in close proximity of a dwelling."

In *State v. Egan*, 272 S.W.2d 719 (1954) the Springfield Court of Appeals stated at page 724:

"Our Supreme Court long ago pointed out that 'A line of cases also hold that though (defendant) be the owner of the premises searched, still those premises must be within the curtilage, and if they are not they do not come within the meaning of the constitutional provision.' *State v. Fenley*, 309 Mo. 520, 275 S.W. 36, 40(7). 'Curtilage' is defined as 'the inclosed space of ground and buildings immediately surrounding a dwelling house' (Black's Law Dictionary, 4th Ed., p. 460) or as 'a yard, courtyard, or piece of ground, included within the fence surrounding a dwelling house' (Webster's New International Dictionary, 2nd Ed., p. 649). Like definitions were approved in *State v. Hecox*, 83 Mo. 531, 536. And, although in its proper legal signification it may no longer be necessary that the area be fenced or enclosed (see 10 Words and Phrases, Curtilage, p. 712), curtilage 'is still a right which goes only with a dwelling house as that term is commonly used and understood'"

The protection against unlawful search of course extends only to one having a possessory interest in the place searched. *State v. Askew*, 331 Mo. 684, 56 S.W.2d 52 (1932).

In those instances where the vehicle is located on public property, the officer while passing can readily observe whether or not the vehicle has a city sticker. By checking with his dispatcher, he can then determine whether or not the automobile is registered to a resident of the city. If the officer determines that such automobile does not have a required sticker, may issue a summons which is part of the uniform traffic ticket set out in Supreme Court Rule 37.1162. In our view, it is entirely proper that he then enter upon the premises of the individual and issue the summons to the owner. Once the officer has made a determination

Honorable E. J. Cantrell

by personal observation, that a violation of the city ordinance exists, he may follow through to the front door of the dwelling place and issue the summons to the owner of the automobile.

In analyzing the general situation, we wish to make note of several important facts. First of all, we join in the view expressed in the article, "Arrest in Missouri" 29 K.C.L.Rev. 1961, by Professor Scurlock that officers of the different classes of municipalities are permitted by law to arrest for violations of the laws of the municipalities committed in the presence of the officer. The cities to which you refer do permit arrest for violation of municipal ordinances when such violations are committed in the presence of the officer. City auto sticker violations which are observed by the police officer are, in our view, violations committed in his presence and uniform summonses may be issued therefor.

We wish to emphasize, as pointed out by Professor Scurlock at page 172 of the cited article, that a statute purporting to authorize arrest upon mere suspicion would undoubtedly be unconstitutional. The statutes authorize the police officers in Kansas City and St. Louis to arrest for a misdemeanor or ordinance violation, not committed in their presence, provided reasonable grounds are present to find that a violation has been committed. Sections 84.090 and 84.710, RSMo 1959. City of St. Louis v. Simon, 223 S.W.2d 864 (Mo.App. 1949).

As concerns the instant situation however, it appears that, as we stated, when the police officer locates a car, which is required by ordinance to bear a city sticker, and such car does not bear a city sticker, then the violation is in fact committed in his presence and the police officer may issue the uniform traffic summons and is not precluded from calling upon the residence of such individual to serve the summons.

However, the rules of unlawful search still obtain; and a police officer is not entitled to search upon private property in the hopes of finding a violation.

For your further information, we are enclosing Opinion Letter No. 75, dated March 8, 1962, to the Honorable George H. Morgan.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

INSURANCE:

Proposed "Indemnity Agreement" in which restaurant operators operating under franchise from common franchisor pay into a fund for the purpose of indemnifying each other against specified losses constitutes "insurance contract" which may not be entered into without complying with insurance laws of the State of Missouri.

OPINION NO. 173

June 9, 1969

Mr. William Y. McCaskill
Superintendent of Insurance
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

This official opinion is issued in response to the recent request for an official opinion submitted by your predecessor with which request he included a proposed "Indemnity Agreement" and asked the opinion of this office "as to whether or not this agreement is beyond the insurance laws of the State of Missouri."

The parties to the agreement referred to as "members" are described as "restauranteurs" who are "affiliated organizations and franchisees of Hilleary and Partners, Ltd." You say that it is your understanding that there are no other contracts among the members and we assume that each operates his own individual restaurant business, independent of the others. Some of the indicated members are corporations and some are partnerships.

The agreement recites that:

" . . . said members are desirous of becoming members of a mutual fund for the mutual benefit of said members against criminal extraction of funds and other assets from their respective establishments. . . "

The agreement provides for the establishment of an "Indemnity Fund" and for a "Governing Committee" of the members to manage and control the fund as attorney-in-fact.

Each member is obliged to pay \$1400 into the Fund, and to make additional payments at three-year intervals. The agreement also provides that:

Mr. William Y. McCaskill

" . . . said fund shall be held for the sole purpose of indemnifying a given member for loss due to a criminal extraction of funds and other assets from their respective establishments. . . ."

There follow three "Indemnity Agreements" for "Coverage A - Robbery Inside the Premises;" "Coverage B - Robbery Outside the Premises;" and "Coverage C - Safe Burglary." The agreement lists ten "exclusions" and several definitions.

A member may withdraw his support at will but is not entitled to refund of the payments he has made. If there are insufficient funds to pay a loss, each member is obliged to contribute his pro-rata share of the deficiency. A majority of the members may terminate the agreement at any time, in which event the proceeds after payment of expenses are to be refunded to the members.

The Indemnity Agreement provides that it is to be governed by the law of Missouri.

Section 375.310 RSMo. Supp. 1967 provides in part as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state . . . shall be subject to suit by the superintendent. . . ."

Such statute goes on to provide for injunctive relief against continuance of the business and for a civil penalty.

The statutes of this state do not define "insurance" or "insurance business."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 257 Mo. 529, 165 S.W. 1084, the Supreme Court of Missouri said, S.W., 1.c. 1086:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss. . . ."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 132 Mo. App. 275, 111 S.W. 592, the Kansas City Court of Appeals said, S.W., 1.c. 593:

Mr. William Y. McCaskill

" . . . Indemnity signifies reimbursement making good, and compensation for loss or injury. . . ."

These definitions are found, in substance, in cases from other jurisdictions and in law dictionaries.

It is apparent that the proposed "Indemnity Agreement" is a contract of insurance within these definitions. Each "Member" pays a consideration, in return for which he is entitled to indemnity against robbery and burglary from the Fund, to the extent that it is adequate, and from the other members if there is a deficiency. The member cannot withdraw his contribution.

It is of no significance that the arrangement is one by which the members insure each other. Sharing of risk is a feature of all insurance. The arrangement bears some similarity to a "Reciprocal or Interinsurance Exchange" as described in Sections 379.650 to 379.790 RSMo. Supp. 1967. Those statutes authorize individuals, partnerships and corporations to "exchange either assessable or nonassessable reciprocal or interinsurance contracts with each other . . ." covering specified perils, subject to licensing by the superintendent of insurance. The clear inference from these statutory sections is that individuals or corporations may exchange indemnity contracts only to the extent permitted by, and only in accordance with, the insurance laws of the state.

Nor is it of any significance that the parties are engaged in the same line of business, or that they operate as franchisees of a common franchisor. Each member receives a promise of indemnity against certain losses to his own, individual business. He therefore receives "insurance".

The fact that no "policies" or other documents besides the Indemnity Agreement are to be issued is unimportant. As the opinion in State ex rel. Inter-Insurance Auxiliary Company v. Revelle, supra. shows, the form of contract is not significant.

The insurance business is closely regulated, so that those who contract for indemnity will receive what they are entitled to. For that reason, the business is limited to those who comply with the statutes. The proposed "Indemnity Agreement" has all the features of an insurance contract, and therefore its consummation would constitute the doing of an insurance business.

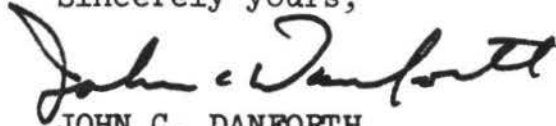
Mr. William Y. McCaskill

CONCLUSION

It is the opinion of this office that the Indemnity Agreement described in the foregoing opinion, by reason of which restaurant operators who are franchisees of a common franchisor contribute to a fund to be used to indemnify the contributors against specified perils, is an "insurance contract." It follows that the parties entering into such a contract would be transacting "insurance business," and would violate Section 375.310 RSMo. Supp. 1967 if they did not comply with the insurance laws of the state.

The foregoing opinion which I approve was prepared by my Special Assistant, Charles B. Blackmar.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

PENSIONS:
RETIREMENT:
CONSTITUTIONAL LAW:

A proposed amendment to a Jefferson City ordinance providing for an increase in pension payments to retired Jefferson City firemen would be in violation of Section 13, Article I, of the Missouri Constitution, if such action would involve taking a portion of the existing retirement fund to pay the increase to retired members.

OPINION NO. 177

March 18, 1969

Honorable Thomas D. Graham
State Representative - 122 District
312 East Capitol Building
Jefferson City, Missouri 65101



Dear Representative Graham:

This is to acknowledge receipt of your request for a formal opinion from this office which reads in part as follows:

"Jefferson City, some years ago, adopted a fireman's pension plan whereby a fireman could retire at half pay. The firemen were excluded from the benefits of social security.

" * * * In other words, a fireman retired in 1949 would have a retirement pay of \$100.00 a month whereas a fireman today would retire at \$214.21.

"As you know, it has been held by your office that those under the State Employees Retirement law already retired would not have the benefit of any increase voted to those presently serving. Is this also true of the fireman's pension plan?"

In determining the amount of retirement benefits for an employee of the local fire department, the pertinent sections of the Revised Ordinances of the City of Jefferson 1956 read as follows:

"Section 473. Fireman retirement fund, board of trustees. -- A firemen retirement fund and a board of trustees of the firemen's retirement fund is hereby created in the City of Jefferson, Missouri, to provide for the retirement of the members of such department, and the widows and minor children of deceased members, as provided in this ordinance, and to take from its municipal revenue a fund for such purposes.

* * * *

"Section 476(c). Every member of the fire department shall be assessed three per cent (3%) of his salary, to be paid in regular monthly payments, which sum is to be deducted from each members compensation which is due him on the first day of each month; this is to be done by the city clerk, who in turn shall give said amounts to the city treasurer, who in turn shall deposit same to the credit of the firemen's retirement fund. Every person who becomes a member of the fire department shall be liable to the aforesaid assessment, and, in becoming a member thereof shall be conclusively deemed to undertake and agree to pay the same and to have it deducted from his compensation as herein provided.

* * * *

"Section 479. Retirement, twenty-four years service. -- Any member of the fire department in service and having twenty-four years or more service in the department, of which the last ten years must be continuous, may file with the board an application for retirement on pension also setting forth a time, not less than thirty nor more than ninety days after filing of the application, at which he desires to be retired, and though his service has been discontinued during such period of notification, he shall be retired by the board as of the time desired, and shall be paid monthly for life out of the fund a retirement pension of one-half his regular monthly salary."

The issue for our determination is whether or not Jefferson City firemen already retired on pensions of half pay, based on their salary at the time of retirement, would be entitled to an increase under a proposed amendment to a city ordinance providing them with pension payments equal to the amount that active firemen will receive when they retire.

The leading Missouri authority on this issue is the case of

State ex rel v. Breshears Missouri State Employees' Retirement System 362 S.W. 2d 571 (1962). In this decision, it was held by the Supreme Court of Missouri, sitting en banc, that a 1961 amendment to a 1957 statute permitting payment of increased benefits to retired members, (emphasis ours) of the Missouri State Employees' Retirement System would take a portion of the fund existing when the amendment was passed to pay the increase and would impair the contract with active members in violation of Section 13, Article I, of the Missouri Constitution.

It is submitted that the same consideration is applicable to the matter in dispute. In line with the reasoning in the Breshears case, retired Jefferson City firemen would not be entitled to increased pension payments if this would necessarily involve taking a portion of the existing retirement fund to pay the "increase" to retired members, the reason being that such action would constitute an impairment of contract in violation of Section 13, Article I, of the Missouri Constitution as to all active firemen not retired and who have since continued to contribute.

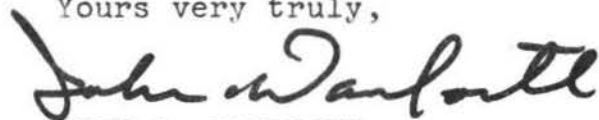
The Breshears case also indicated that a token payment to the system by retired members would not suffice to entitle them to share in future increased benefits. To avoid constitutional objections, each contribution would have to equal the present cash value, determined on an actuarial basis, of the increase to each contributor. See 362 S.W. 2d at 577.

CONCLUSION

It is the opinion of this office that a proposed amendment to a Jefferson City ordinance providing for an increase in pension payments to retired Jefferson City firemen would be in violation of Section 13, Article I, of the Missouri Constitution, if such action would involve taking a portion of the existing retirement fund to pay the increase to retired members.

The foregoing opinion which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answered by letter-Wood

August 29, 1969

OPINION LETTER NO. 178

Honorable Roy L. Carver, Director
Division of Veterans Affairs
Broadway State Office Building
P. O. Drawer 147
Jefferson City, Missouri 65101

Dear Mr. Carver:

In your letter of March 7, 1969, you inquired if a member of the Advisory Committee on Veterans Affairs, duly appointed pursuant to Section 42.055, RSMo Supp. 1967, could appoint an alternate, with full powers, to attend meetings of the Committee in his stead.

The above statute provides that the governor shall appoint the six members of the Committee, by and with the advice and consent of the Senate, for six year terms. It further provides that any vacancy shall be filled by appointment for the unexpired term in the manner of regular appointments and that the governor may remove a member for cause.

We must answer your question in the negative, for "Except as provided in this Constitution, the appointment of all officers shall be made as prescribed by law." (Article VII, Section 7, Constitution of Missouri, 1945). Clearly, the law creating the Veterans Affairs Advisory Committee has prescribed that appointment thereto shall be made by the governor with the advice and consent of the Senate. To allow each duly appointed member to appoint another, even temporarily would, we think, be inconsistent with the manner of appointment prescribed by law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

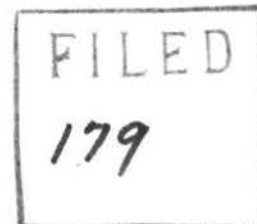
EMINENT DOMAIN:
JUST COMPENSATION:
BONDS:
SECURITIES:
CONDEMNATION:

Bonds do not satisfy the Missouri constitutional requirement for just compensation for property taken by the state by condemnation.

OPINION NO. 179

December 2, 1969

Honorable Harold J. Esser
Representative - 18th District
3 West Glen Arbor Road
Kansas City, Missouri 64114



Dear Mr. Esser:

This office is in receipt of your request concerning the constitutionality of bonds as compensation for land acquired for highway purposes by condemnation. A resolution of this question depends ultimately on whether bonds fulfill the fundamental requirements of just compensation prescribed by Section 26, Article I of the Missouri Constitution.

Section 26, Article I of the Missouri Constitution provides in part:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. . . ."

A bond is defined in the Missouri Revised Statutes, as an "obligation." Section 99.320, RSMo 1959. Bonds do not serve as actual payment for the land acquired, but are promises to pay in the future. Bonds are also a contract which, if tendered, bind the state to some future payment. *Stifel Estate Co. v. Cella*, 220 Mo.App. 657, 291 S.W. 515 (St.L.Ct.App. 1927), refers to bonds as contracts.

The state may acquire private property by an exercise of its police power, Railroad Company v. Husen, 95 U.S. 465, (1877), through the power of eminent domain, Backus v. Fort Street Union Depot Co., 169 U.S. 557 (1898).

In the case of Waterbury v. Platt Bros. & Co., 56 A. 856, the Supreme Court of Errors of Connecticut said, l.c. 858:

" . . . 'Just compensation' means a fair equivalent in money, which must be paid at least within a reasonable time after the taking, and it is not within the power of the Legislature to substitute for such present payment future obligations, bonds, or other valuable advantage. . . ."

Section 17, Article II of the Arizona State Constitution provides in part:

"No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner. . . ."

In Gardner v. Henderson, 103 Ariz. 420, 443 P.2d 416 (1968), the Arizona Supreme Court said, l.c. 420, 421:

"A bond is not money. A bond is not payment. A bond is not 'just compensation made' and its deposit with a court is not a payment into court. A bond is a certificate or evidence of a debt. It is a contract to pay upon the happening of certain contingencies. It is a mere promise to pay. See Black's Law Dictionary, Deluxe Fourth Edition.

"Article 2, § 32 of the Arizona Constitution, states:

'The provisions of this Constitution are mandatory, unless by express words they are declared to otherwise.'

"The immediate taking of possession of property by a municipality is a taking of property. Possession is certainly one of the greatest attributes of ownership of property. The possessor exercises dominion over the property, and a condemnor, be it municipality or private corporation thereafter denies the owner of its usage, its rental value, and its enjoyment. Where the condemnor proceeds to convert the property to its

public usage he proceeds to 'damage' the property. While a taking may not be complete until after final judgment and vesting of title a taking nevertheless commences with an order of immediate possession which permits the condemnor to enter the land, demolish improvements, and commence the erection of public improvements. It follows therefor that an order of immediate possession must comply with Art. 2, § 17, supra.

"It is obvious from the provisions of the Constitution and laws of this state that private property may not be taken for public use without just compensation having first been made or paid into court for the owner. The portion of the Constitution quoted above is mandatory.' State ex rel. Morrison v. Jay Six Cattle Company, 85 Ariz 220, at page 224, 335 P.2d 799, at page 801. [Emphasis in original]

"A bond is a security for just compensation and its deposit in court is a promise to pay into court at a later date. In holding the bond provision of A.R.S. § 12-1116 unconstitutional because of the mandatory provisions of Art. 2, § 17, we yet note the practical and economical wisdom of the arguments for bond usage. The root of our power, however, is derived from the Constitution and the preservation of its mandatory provisions is essential to the security of individual rights and the perpetuity of free government. If it be deemed desirable in this state that the 'state, county, city, town, or political subdivision thereof' be entitled to file 'a bond in a form to be approved by the court' then that result must be obtained through constitutional amendatory channels."

The Missouri Constitution is similar to that of Arizona. We believe that the reasoning of the Supreme Court of Arizona is applicable to the provisions of Section 26, Article I of the Constitution of Missouri and that a law providing payment by bonds for property condemned by the state would be unconstitutional.

CONCLUSION

It is therefore the opinion of this office that payment with bonds for the taking of private property by the state by condemnation does not satisfy the requirement in the Missouri

Constitution that private property not be taken without just compensation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent than the last name "Danforth".

JOHN C. DANFORTH
Attorney General

COUNTY COUNSELOR:
ATTORNEYS:

(1) An assistant county counselor of a first class county can also be employed as counsel by a sewer district formed under Sections 204.250 through 204.470, RSMo Supp. 1967; (2) An assistant county counselor of a first class county may also be employed as administrative assistant of the highway engineer of that county, so long as such person in no way renders legal services in his capacity as administrative assistant.

OPINION NO. 181

April 29, 1969



Honorable Jim Tom Reid
County Counselor
Jackson County
Suite 202
Court House
Kansas City, Missouri 64106

Dear Mr. Reid:

This is in answer to your request for an official opinion of this office concerning the legality of employment by the county counselor of a first class county of a person employed by a sewer district or by the county highway department.

We will first consider the sewer district question. You have submitted the following facts concerning the employment by the county counselor of a person employed by a sewer district:

"As attorney for the Little Blue Valley Sewer District, Mr. Kelley has no duties for Jackson County whatsoever. He is attorney on a part-time basis for an entirely separate body politic. His employment in the County Counselor's office is strictly upon a part-time basis (The entire office, including myself, is so employed). His duties in this office involve rendering no services whatsoever to the sewer district. In brief, there is no overlapping of time nor duplication of services rendered by Mr. Kelley in his work for his two separate employers."

The Little Blue Valley Sewer District was formed under the provisions of Sections 204.250 through 204.470, RSMo Supp. 1967. Section 204.290, RSMo Supp. 1967, states that the sewer district shall be considered in law and equity a body corporate and politic. As a body

Honorable Jim Tom Reid

corporate and politic the sewer district is not a department or agency of the county and thus is not represented by the county counselor or his assistants under Section 56.640, RSMo 1959.

Section 204.300, RSMo Supp. 1967, specifically provides that the board of trustees of the sewer district have the power to employ an attorney. Therefore, since there is no incompatibility or conflict it is our opinion that an assistant county counselor of a first class county can also be employed as counsel by a sewer district formed under Sections 204.250 through 204.470.

The second question concerns the county highway department. You have submitted the following facts concerning the employment by the county counselor of a person employed by the county highway department:

"Mr. Shaffer is employed as an attorney for Jackson County by this office and as such, does perform legal services involving the Jackson County Highway Engineer; however, his services for this office also include services to the other elected officials, to the resolution of problems concerned with our capital improvements program and to legal problems arising in connection with the daily administration of that part of the county government directly under the County Court. Upon investigation, I find that his employment by the Highway Department is in no way employment with a view toward procurement of legal services. He is employed as an Administrative Assistant and Lobbyist for the Highway Department on a part-time basis and as such, is registered as a lobbyist for that department with the Secretary of State for the state of Missouri. Briefly, once again, I find no overlapping of time nor duplication of the services rendered by Mr. Shaffer to this office as Assistant County Counselor and to the office of the County Highway Engineer as an Administrative Assistant."

The duties of the county counselor and his assistants of a first class county are given in Section 56.640, supra, as follows:

"The county counselor and his assistants under his direction shall represent the county and all departments, officers, institutions and agencies thereof, except as otherwise provided by law and shall upon request of any county department, officer, institution or agency for which legal counsel is otherwise provided by law,

Honorable Jim Tom Reid

and upon the approval of the county court, represent such department, officer, institution or agency. He shall commence, prosecute or defend, as the case may require, and exercise exclusive authority in all civil suits or actions in which the county or any county officer, commission or agency is a party, in his or its official capacity, draw all contracts relating to the business of the county and shall represent the county generally in all matters of civil law, and shall upon request furnish written opinions to any county officer or department."

Sections 61.010 through 61.150, RSMo, provide for a county highway engineer for a first class county. Section 61.010, RSMo 1959, creates the office of county highway engineer and surveyor designated as "highway engineer." The highway engineer is an elected official of the county, Section 61.020, RSMo 1959, who has direct supervision over the construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts in the county, Section 61.070, RSMo 1959, and shall personally or by deputy inspect same, Section 61.080, RSMo 1959.

It is clear that the county counselor and his assistants shall represent and give legal service to the county highway engineer.

Assistants are authorized for the highway engineer in Section 61.060, RSMo 1959, as follows:

"The county highway engineer is authorized to employ such technical and professional help and assistants at such salaries or under such terms as may be approved by the county court.* * *"

Of course, the highway engineer could not employ an attorney for representation or legal services. However, we see no prohibition against the employment of an administrative assistant. Furthermore, it is our opinion that there is no prohibition against an assistant county counselor being employed by the highway engineer as administrative assistant, so long as such person in no way renders legal services in his capacity as administrative assistant.

CONCLUSION

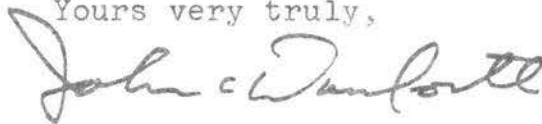
It is the opinion of this office that: (1) An assistant county counselor of a first class county can also be employed as counsel by a sewer district formed under Sections 204.250 through 204.470, RSMo Supp. 1967; (2) An assistant county counselor of a first class county may also be employed as administrative assistant

Honorable Jim Tom Reid

of the highway engineer of that county, so long as such person in no way renders legal services in his capacity as administrative assistant.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General



March 20, 1969 Answered by Letter
Jones

Opinion Letter No. 187

Mr. Edwin M. Bode, Secretary
Missouri State Employees Retirement System
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bode:

This letter is in response to your request for an opinion as to whether increased retirement benefits may legally be paid out of state funds to retired members of the Missouri State Employees Retirement System as provided for in Senate Bill No. 296.

This office has previously advised that retired state employees may not be given increased benefits from public funds after their retirement because to do so would constitute a grant of extra compensation after service has been rendered, in violation of Article III, Section 39 (3) Missouri Constitution. Attached are copies of Opinion No. 95, 5-12-61, Welborn, and Opinion No. 39, 10-19-61, Hemphill.

For the above reason, the contemplated legislation to increase retirement benefits may not legally apply to persons who have retired and are receiving benefits on the effective date of the increase.

Yours very truly,

JOHN C. DANFORTH
Attorney General

enc: Op. No. 95, 5-12-61, Welborn
Op. No. 39, 10-19-61, Hemphill

PENSIONS:
RETIREMENT:
CONSTITUTIONAL LAW:

An individual who is sixty years of age, with fifteen years of creditable service in the State Retirement System, but who has not retired and is no longer a contributing member of the system, may not receive an increase in retirement benefits as provided for in House Bill 480 of the Seventy-Fifth General Assembly if such person does not re-enter state employment.

September 16, 1969

OPINION NO. 188



Mr. Edwin M. Bode, Secretary
Missouri State Employees' Retirement System
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"I would like to request an opinion as to whether an individual who is sixty years of age and has been a member of the State Retirement System for fifteen years, but who has not retired and is no longer a contributing member of the system, may receive an increase in retirement benefits from one per cent (1%) to one and one-half per cent (1 1/2%) as provided for in house bill No. 480, upon his retirement."

Senate Substitute for House Bill No. 480 of the Seventy-Fifth General Assembly which will be effective October 13, 1969, among other things repeals Section 104.390, RSMo 1959, and enacts in lieu thereof, one new section which reads as follows:

"The normal annuity of a member shall equal one and one-fourth percent of the average compensation of the member multiplied by the number of years of creditable service of such member; except that the minimum annuity of any legislative member of the state employees' retirement system who has served six or more years as a member of the general assembly and who meets the conditions for retirement at or after normal retirement age shall consist of monthly

Mr. Edwin M. Bode -

payments made at the rate of thirty-seven dollars and fifty cents multiplied by the number of biennial assemblies in which he has served."
(emphasis ours)

The assumption is made that the opinion request refers to an individual who is not presently employed by the state; and who does not re-enter state employment in the future. We will also assume that the individual has obtained fifteen years of creditable service in state employment as defined in Subsection 10 of Section 104.340, RSMo 1959; and has elected not to withdraw his contributions made to the Retirement System during his period of service.

The leading Missouri authority on the issue presented is the case of State ex rel Breshears v. Missouri State Employees' Retirement System, 3625 S.W.2d 571 (1962). In this decision, it was held by the Supreme Court of Missouri, sitting en banc, that a 1961 amendment to a 1957 statute permitting payment of increased benefits to retired members (emphasis ours) of the Missouri State Employees' Retirement System would take a portion of the fund existing when the amendment was passed to pay the increase and would impair a contract with active members in violation of Section 13, Article I, of the Missouri Constitution.

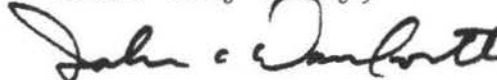
It is submitted that the same consideration is applicable to the matter in dispute. In line with the reasoning in the Breshears case, non-active members, that is those who do not make contributions to the System, would not be entitled to increased retirement benefits as this would necessarily involve taking a portion of the existing retirement fund to pay the "increase" to such non-active members. Therefore, such action would constitute an impairment of contract in violation of Section 13, Article I, of the Missouri Constitution as to all active members who have since continued to contribute to the Retirement System.

CONCLUSION

It is the opinion of this office that an individual who is sixty years of age, with fifteen years of creditable service in the State Retirement System, but who has not retired and is no longer a contributing member of the System, may not receive an increase in retirement benefits as provided for in House Bill 480 of the Seventy-Fifth General Assembly if such person does not re-enter state employment.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



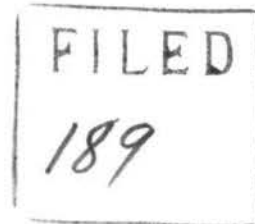
JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

October 10, 1969

OPINION LETTER NO. 189

Honorable Allen S. Parish
Prosecuting Attorney
Saline County Court House
Marshall, Missouri 65340



Dear Mr. Parish:

This is in response to your request for an opinion concerning the relationship of an alleged primary "election" held by some members of the Democratic Party in Marshall, Missouri purportedly to nominate candidates for the city council to the liquor laws of the state, specifically §311.290, RSMo Supp. 1967.

Section 311.290, RSMo Supp. 1967, relating to liquor licenses provides in pertinent part as follows:

"No person having a license under this law nor any employee of such person shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity . . . after 1:30 a.m. upon the day of any general, special or primary election in this state at which candidates for public office are elected or nominated or after 1:30 a.m. upon the day of any county, township, city, town or municipal election at which candidates for public office are elected or nominated, . . ."

Further correspondence with you reveals the following facts with respect to this alleged "election."

1. The Democratic Party candidates for the office of city council are chosen by balloting on the part of all members of the local Democratic Party who wish to participate at this alleged election.

Honorable Allen S. Parish

2. The City of Marshall has no ordinances supervising, controlling, or authorizing this alleged "election" or any alleged election of this type.

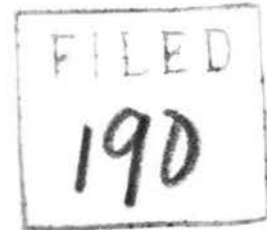
3. The City of Marshall is not bound by the outcome of this alleged "election," although the Democratic Party purports to be.

It is our view that the term "election" as used in §311.290 necessarily means that type of proceeding whereby the city or other entity which has a public office to be filled by election is bound by the outcome. Under the facts as given, it is clear that this does not involve an attempt by the City of Marshall, Missouri to select candidates for the public office of city councilman through the elective process, but merely an intra-organization alleged "election" on the part of some members of the local Democratic Party. Since the City of Marshall is not bound by the outcome of this alleged "election," it is our opinion that such proceeding does not constitute an election within the meaning of §311.290, RSMo Supp. 1967.

Therefore, the liquor licensees in Marshall are not required to close down their establishments on the day some members of the Democratic Party hold an alleged "election" in Marshall purportedly to nominate candidates for city council.

Yours very truly,

JOHN C. DANFORTH
Attorney General



OPINION LETTER NO. 190

Answered by letter - Gardner

The Honorable Donald L. Manford
Missouri Senate
Jefferson City, Missouri 65101

Dear Senator Manford:

Reference is made to your inquiry as to what constitutes a "retailer" under the provisions of the present Missouri Meat Inspection Law.

This law is set forth in Sections 265.300 to 265.470, RSMo Supp. 1967. The term "retailer" is not used or defined in this law. However, Section 265.320 provides that:

"The commissioner shall exempt from the provisions of sections 265.300 to 265.470:

* * * *

"(c) Retail dealers, with respect to meat and poultry which has been inspected federally or by other approved inspection, sold directly to consumers in individual retail stores, if the processing by the dealer is limited to the cutting up of meat or poultry on his premises to supply his own customers; * * *"

Legislation in which the word retail was used but not defined has been considered by the courts. In Fountain vs. St. Joseph Water Company, 180 S.W.2d 28, the Supreme Court of Missouri stated:

"* * * In White Motor Co. v. Littleton, 5 Cir., 124 F.2d 92, 93, the Court said 'The word retail is not defined by the Act. Given its common and ordinary acceptance when used in sales parlance,

The Honorable Donald L. Manford -

it means a sale in small quantity or direct to the consumer, as distinguished from the word wholesale, meaning a sale in large quantity to one who intends to resell.' * * * "

It appears therefore that a retail meat dealer may be defined as a person who sells meat to consumers, and whether or not he will be subject to the provisions of the Meat Inspection Law depends upon whether or not the meat has been inspected federally or by other approved inspection, and whether "the processing by the dealer is limited to the cutting up of meat or poultry on his premises to supply his own customers".

Yours very truly,

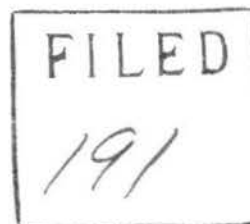
JOHN C. DANFORTH
Attorney General

COUNTIES:
PROBATE COURTS:

County must bear expense of authorized
photographic reproduction and destruc-
tion of probate court records.

OPINION NO. 191

August 7, 1969



Honorable Byron C. Kinder
Prosecuting Attorney
Cole County
Jefferson City, Missouri 65101

Dear Mr. Kinder:

This official opinion is issued pursuant to your request of recent date in which you ask whether the probate court has authority to order the photographic reproduction of certain files and records, with destruction of the originals, and whether the county court is obliged to pay the cost thereof.

Section 109.120, RSMo Supp. 1967, provides in part as follows:

"...the judges and justices of the several courts of record within this state may cause all closed case files more than five years old to be photographed, microphotographed, photostated or reproduced on film."

This statute deals with the cost of photographic reproduction in express terms by providing:

"* * *The cost of photographing, microphotographing, photostating or reproducing on film of closed files of the several courts of record as provided herein shall be chargeable to the county and paid out of the county treasury wherein the court is situated. * * *"

Section 109.140(2), RSMo Supp. 1967, provides:

"* * *The supreme court may authorize the disposal, archival storage or destruction of its own closed court files more than five years old and such files of the several courts of record when the photostatic copies, photographs, microphotographs or reproductions on film are placed in conveniently accessible files and provisions made for preserving, examining and using them."

Article V, Section 17 of the Missouri Constitution provides that the probate courts are courts of record.

By order of September 20, 1966, 405 SW 2d xix, the Supreme Court authorized the disposal, archival storage or destruction of files of probate courts in which no action has been taken for ten years, provided that the files have been

Honorable Byron C. Kinder

photographically reproduced in compliance with Section 109.120, RSMo Supp. 1967, and that the reproductions have been made readily available. The order goes on to provide as follows:

"All action taken with regard thereto shall be under the authority and direction of the Judge of each of the Probate Courts, and any rules, or methods of preservation, and examination and use, or fees charged for reproducing, shall be fixed by such probate court."

The sense of the order is that the probate court is to have the discretion to determine which files are to be reproduced and destroyed, and what process of reproduction is to be used. The order of the Supreme Court merely gives authority for destruction. It does not direct the destruction of anything.

The Supreme Court's order says nothing about the cost of reproduction or destruction. Two statutory provisions in addition to Section 109.120, RSMo Supp. 1967, supra. are material. Section 476.270, RSMo provides:

"All expenditures accruing in the . . . probate courts, except salaries and clerk hire which is payable by the state, shall be paid out of the treasury of the county in which the court is held in the same manner as other demands."

Section 481.060 RSMo provides:

"Every probate court shall have a seal of office, of some suitable device, the expense of which, and the necessary expense incurred by said court for books, stationery, furniture, fuel and other necessities, shall be paid by the county."

The above statutes, together with the Supreme Court order, show a clear pattern. The probate court may decide whether any files or records are to be reproduced and destroyed, what files or records are to be so treated, and the reproductive process to be used. No records may be destroyed except those authorized by the Supreme Court. With this qualification, the probate court has complete discretion. The expense must be borne by the county. The statutes clearly say so.

Situations in which a county must pay expenses deemed necessary by the probate court are not at all unusual. When the probate judge certifies that postage stamps are necessary, the county must bear the cost. Saylor vs. Nodaway County, 159 Mo. 520, 60 SW 1057 (1901). The probate judge may decide that the business of his court requires a separate telephone in the courtroom, and the county must pay the cost. Hale vs. Texas County, 178 SW 865 (1915); Motley vs. Pike County, 232 Mo. 42, 135 SW 39 (1911). The matter of reproduction and destruction of files and records relates to the efficient use of office space and to the storage of court files, and the probate court has full authority to determine what is necessary.

Honorable Byron C. Kinder

CONCLUSION

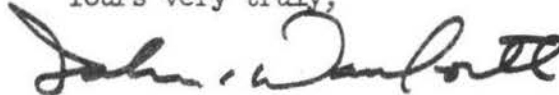
It is the opinion of this office:

(1) That each probate court has the discretion to order the destruction of probate files in which no action has been taken for ten years, so long as the files are reproduced in compliance with Section 109.120, RSMo Supp. 1967, and the reproductions are made readily accessible.

(2) That the county must bear the expense of reproduction in a manner authorized by the probate court, and of destruction, if the probate court orders any such reproduction and destruction.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

CBB: mlz

COUNTY COLLECTOR:
FEES, COMPENSATION & SALARIES:
COMPENSATION:

A county collector in a third class county not having township organizations is authorized to collect and retain a commission

under Section 52.260, RSMo Supp. 1967, for collecting taxes levied under Section 278.250, RSMo Supp. 1967.

OPINION NO. 192

April 22, 1969



Mr. Lee Norbury, Executive Secretary
State Soil and Water District Commission
705 Hitt, University of Missouri
Columbia, Missouri 65201

Dear Mr. Norbury:

This is in reply to your request for an opinion of this office as to whether a county collector in a third class county not having township organizations is authorized to deduct a commission for collecting watershed taxes.

Section 278.250, RSMo Supp. 1967, provides for an organization tax and an annual tax for soil and water conservation subdistricts and the manner of collection thereof. This section reads in part as follows:

"5. The body having authority to levy taxes within the county shall levy the taxes provided in this law, and all officials charged with the duty of collecting taxes shall collect the taxes at the time and in the form and manner and with like interest and penalties as other taxes are collected; computation shall be made on the regular tax bills, and when collected shall pay the same to the subdistrict ordering its levy and collection or entitled to the same, and the payment of such collections shall be made monthly to the treasurer of the subdistrict. The proceeds shall be kept in a separate account by the treasurer of the subdistrict and identified by the official name of the subdistrict in which the levy was made. Expenditures from the fund shall be made on requisition of the chairman and secretary of the governing body of the district."

Mr. Lee Norbury

Thus, the taxes levied must be collected by the county collector the same as other taxes, and when collected must be used for the listed specific purposes. There is no provision for payment of compensation or a fee to the collector in Section 278.250.

The general rule is that compensation for a public officer must be specifically provided for by statute. Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857, 860.

Commissions for county collectors are provided for in Section 52.260, RSMo Supp. 1967, in part as follows:

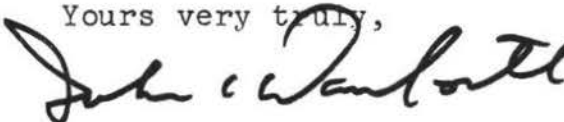
"The collector in counties not having township organization shall collect and retain the following commissions for collecting all state, county, bridge, road, school and all other local taxes, including merchants', manufacturers' and liquor and beer licenses, other than back, delinquent and ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees."

It is our opinion that the taxes provided for in Section 278.250 come under the meaning of "all other local taxes."

CONCLUSION

It is the opinion of this office that a county collector in a third class county not having township organizations is authorized to collect and retain a commission under Section 52.260, RSMo Supp. 1967, for collecting taxes levied under Section 278.250, RSMo Supp. 1967.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ROADS AND BRIDGES:
COUNTY COURT:
TAXES (ROADS AND BRIDGES):
SEWER DISTRICTS:

Revenue derived from a county tax levy under Section 137.555, RSMo can be used only for road and bridge purposes and, therefore, cannot be expended for Jackson County Sewer District purposes.

June 12, 1969

OPINION NO. 193

Honorable William Moore
State Representative
Room #235B - 3rd District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Moore:

This is in answer to your letter of recent date in which you asked for an opinion on the subject matter of a letter from Judge Charles B. Wheeler, Jr. The question raised by Judge Wheeler is whether the Jackson County Sewer District can be funded on an interim basis from the County Road and Bridge Fund until such time as the proceeds of bonds to be issued by the district are available.

The Jackson County Sewer District was organized under the provisions of Senate Bill No. 396 adopted by the 74th General Assembly of the State of Missouri. Sections 204.250 through 204.470, RSMo Supp. 1967, states that the purpose of districts created pursuant to the Act is the construction and maintenance of a common system of trunk sewers and sewage treatment plants. Section 204.360 describes the funds that may be used to pay the costs of accomplishing this purpose. One such source of funds is described in subdivision 2 as follows:

"* * *any other funds which may be obtained under any law of the state or of the United States or from any county or municipality for that purpose; * * *"

Thus the statute contemplates that funds may be obtained by the district from the county. The specific question raised by your letter, however, is whether funds from the County Road and Bridge Fund may be paid over to the district.

Section 12(a) of Article X of the Missouri Constitution authorizes the levy of a tax by counties "to be used for road and bridge purposes." Section 137.555, RSMo 1959, provides that this tax shall be:

"* * *collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; * * *"

Section 137.557(3), RSMo Supp. 1967, authorizes the county court under some circumstances to refund money in the Road and Bridge Fund to certain cities. This section limits the use of the funds refunded as follows:

Honorable William Moore

"* * *any such refund shall be used and applied by such city exclusively in the improvement and repair of public roads, streets and bridges within the corporate limits of such city and within the county making the refund, and for no other purpose whatever; * * *"

The provisions quoted above clearly and expressly prohibit the use of funds in the Special Road and Bridge Fund for anything that cannot be classified as a road and bridge purpose. Since the construction and maintenance of a common system of trunk sewers and sewage treatment plants cannot reasonably be classified as a road and bridge purpose, it is the opinion of this office that the Jackson County Sewer District cannot be funded from the Road and Bridge Fund on either a temporary or a permanent basis.

CONCLUSION

It is the opinion of this office that revenue derived from a county tax levy under Section 137.555 RSMo, can be used only for road and bridge purposes and therefore cannot be expended for Jackson County Sewer District purposes.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, James E. Westbrook.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

1969



OPINION LETTER NO. 194
Answered by letter - Bern

Honorable Robert L. Dunkeson
Executive Secretary
State Inter-Agency Council for
Outdoor Recreation
1203 Jefferson Building
P.O. Box 564
Jefferson City, Missouri 65101

Dear Mr. Dunkeson:

This is in response to your request for an opinion from this office, regarding the time at which the City of Joplin "assume[d] legal ownership" of a particular piece of property.

On the basis of the information which has been supplied we are unable to render an opinion as to the date on which "the City of Joplin did in fact assume legal ownership of the . . . 8.3 acres of land," and this for the reasons set out below.

The only information we have regarding the transaction is as follows:

1. It appears that on October 18, 1966 a general warranty deed was signed by Leona E. Martin, Katherine F. Sebastian, John W. Freeman, Bonnie Freeman, John R. Foster, Martha Foster, William E. Freeman, Florence E. Chadwell, and Earl Chadwell, grantors, notarized by Betty Ann Mathis, running in favor of the City of Joplin, grantee.
2. The City of Joplin entered into an agreement with the State Inter-Agency Council for Outdoor Recreation for the acquisition of 8.3 acres of land for an addition to Spiva Park, the terms of said agreement requiring that the property be purchased by the City during the project period, August 1, 1967 to May 1, 1968.

Honorable Robert L. Dunkeson

3. A check for the purchase of the property described in the above-mentioned general warranty deed is dated April 25, 1968, a point in time within the project period.

4. The Department of the Interior's Bureau of Outdoor Recreation Manual currently in effect provides in pertinent part:

Relationship of Costs to Project Period.
To be eligible for matching assistance, costs must have been incurred within the project period or the period covered by the agreement . . .

Acquisition costs are incurred when the signed deed, lease, or other appropriate conveyance is taken by the participant.
(Emphasis added).

In view of the fact that the Outdoor Recreation program, 16 U.S.C. 460 l, is national in scope, the directions with regard to determining when acquisition costs are incurred are apparently intended to produce a system of uniform application throughout the nation, and thus to avoid such local doctrines regarding the passage of title as the doctrine of equitable conversion. The provision with regard to when acquisition costs are incurred clearly does not appear to suggest that they are incurred when the deed is signed by the grantees, for the language is in terms of when something is done with the signed deed. Nor would one expect that the Secretary of the Interior, or his authorized delegate, would mean to imply a taking by the grantee against the will of the grantor. It is our opinion that the term "taken" as used in the Department's Bulletin is intended to encompass the common requirements of: (1) delivery of the deed by the grantor, and (2) acceptance of the same by the grantee. See: Sando v. Phillips, 319 S.W.2d 648 (Mo. 1959) (delivery is essential to the validity of the deed, which takes effect from the date of delivery and not from the date of execution); Donnelly v. Robinson, 406 S.W.2d 595 (Mo. 1966) (to be operative as transfer of ownership deed must be delivered to grantee or someone for him); Weigel v. Wood, 194 S.W.2d 40 (Mo. 1946) (acceptance of deed by grantee is necessary to its validity).

It being clear that your agency will want to inquire further to determine the precise facts with regard to the elements of delivery and acceptance, we are not in a position at this point to render an opinion as to the date when the acquisition costs

Honorable Robert L. Dunkeson

were incurred. It appears that your inquiry with regard to when the City of Joplin "assume[d] legal ownership" of the land is likewise dependent upon your additional findings as to when delivery and acceptance occurred. For this same reason we are unable at this point to render an opinion as to when the City "assume[d] legal ownership."

Yours very truly,

JOHN C. DANFORTH
Attorney General

LOTTERIES:
REFERRAL SELLING:

Referral selling operation described herein in which the purchaser participant is involved in earning some of his commissions through the enrollment of other purchasers is nevertheless a lottery.

OPINION NO. 195

May 15, 1969

Honorable John Crow
Prosecuting Attorney
Greene County
Court House
Springfield, Missouri 65802



Dear Mr. Crow:

This is in response to your request of March 19, 1969, for an opinion from this office concerning referral selling. Specifically, you wish to know whether referral selling as is described below:

1. Is a lottery under the provisions of Sections 563.430 and 563.440, RSMo Supp. 1967.

The specific referral selling scheme to which the opinion request referred differs from the usual referral selling scheme by virtue of the participation of the purchasers. Initially, the buyer is brought to a meeting by a salesman of the seller or a friend who has, himself, become involved in the referral selling scheme. He is induced there to purchase an item at an amount greater than its retail price, and to pay an additional sum to become either a "founder distributor" or a "founder supervisor" for the referral seller. The purchase of the item by this "founder" is incidental to his role as founder and the inducement for the purchase is not the value of or the need for the item, but the opportunity to make a substantial amount of money by becoming a founder.

The referral seller promises to build or otherwise establish a "market center" in the area at which the merchandise will be sold to persons holding special "purchase authority cards" only. This center will be built within sixty days after one hundred percent of the founders provided for (no more than two-thirds of one percent of the total population of a trade area, or five thousand persons, whichever is smaller) are enrolled. A "trade area" is defined in the founder purchase contract as encompassing "a seventy-five mile

Honorable John Crow

radius of any city or town chosen, and at [the seller's] option, may be a smaller geographic area." However, the trade area may not be smaller than one with a population large enough to permit the enrollment of two thousand founders and distribution of one hundred thousand purchase authority cards. If fewer than one hundred percent of the founders planned for are enrolled, the center will be built, only it will be a smaller facility. There is no promise that the center will be built within any specified time, however.

Purchasers brought into this referral selling operation may enroll as either founder "distributors" or founder "supervisors." A founder distributor must purchase either a tape recorder or a set of cookware for \$150.00, of which \$60.00 is commission and \$90.00 is purchase price. A founder supervisor must purchase either a color television set or a music center for \$750.00, of which \$450.00 is commission ("training fee").

A founder distributor receives fifty "purchase authority cards" for distribution to potential customers of the seller's market center. On each sale to a person holding a card distributed by him, the distributor receives a commission of four percent, subject to a deduction of five cents for each card distributed to him per month in any quarter in which anyone of those cards was used for a purchase at the market center. In addition to this, and by far the major inducement to persons who are asked to become founders, a distributor receives \$50.00 for every founder distributor and \$100.00 for every founder supervisor whom he presents for enrollment. If a founder distributor becomes a founder supervisor (through another purchase for \$210.00 and a \$390.00 "training fee"), the distributor who enrolled him receives an added commission of \$50.00. For every ten founders he enrolls, a distributor receives an added ten purchase authority cards for distribution. The founder distributor is required by the contract he signs to encourage purchase authority cardholders to purchase merchandise at the seller's center. If a purchase authority cardholder does not make purchases for two consecutive quarters, the distributor must seek to redistribute that holder's card to another person. The seller engages that he will send such distributor reports quarterly as to the number of purchases made by persons holding cards distributed by that founder.

A founder "supervisor" receives fifty purchase authority cards for distribution, and he earns a five percent commission on each purchase made with such a card (subject to the same five cent deduction described above). For each distributor he causes to be enrolled, the supervisor receives a commission of \$60.00, and for every supervisor he causes to be enrolled, he receives \$450.00. If a distributor enrolled by this supervisor himself enrolls a

Honorable John Crow

distributor, the supervisor receives a commission of \$10.00 for the enrollment of this "indirect" founder. And, if that indirect distributor upgrades himself to a supervisor, the original supervisor receives another \$340.00. The supervisor also receives \$390.00 for every direct distributor whom he enrolled who becomes a supervisor. For sales made by the use of purchase authority cards issued by distributors whom he enrolled, the supervisor receives an amount equal to twenty-five percent of the commissions earned on such sales by "his" distributors.

There is no limit on the number of supervisors who might be enrolled in this program other than the total limit on the number of founders. Conceivably, all distributors may become supervisors. While supervisors are required to attend sales meetings and training sessions, if such are held (there is no obligation on the part of the seller to hold any), and to exhort the distributors "in his sales organization" to greater efforts in encouraging the use of purchase authority cards and the enrollment of founders, the supervisor has no supervisory authority over "his" distributors. While he is to have sales meetings, "his" distributors are not obliged to attend. The supervisor is given reports on the purchases made by holders of purchase authority cards distributed by him and by "his" distributors.

The referral seller supplies all promotional aids to the founders and aids them in enrolling other founders. The actual sale and enrollment process is performed at a meeting to which the founders bring their friends and other prospects. The sales pitch is based on the opportunity to earn money rather than on the value of the items to be sold. The founder is instructed to participate in the process by which his prospect is persuaded to enroll; and, in fact, the founder himself takes on the initial job of persuading his prospect to make the purchase and become a founder.

I. IS THIS A LOTTERY?

While the laws of Missouri do not define the term, "lottery," both statute and constitutional provisions prohibit it. Missouri Constitution, Article III, Section 39 (9); Section 563.430, RSMo Supp. 1967. However, the term has received a judicial gloss from the Missouri courts, and has been the subject of opinions of this office. Generally, a lottery is a device whereby a person is offered a chance to receive great gain in exchange for some consideration. The Supreme Court of Missouri said, in State ex inf. McKittrick vs. Globe-Democrat Publishing Company, 341 Mo. 862, 110 S.W.2d 705 (1937), that a lottery has three elements: consideration, prize, and chance. In view of the constitutional status of Missouri's prohibition of lotteries, these elements should be applied broadly to fulfill the apparent purpose of the prohibition. For example, in State vs. McEwan,

Honorable John Crow

343 Mo. 213, 120 S.W.2d 1098 (1938), the court held that a "bank night" was within the definition of "lottery" even though persons could register and qualify for prizes without actually purchasing a ticket to the movie house which held the "bank night." Consideration existed as a practical matter, the court held, because a person had to be present to claim his prize and make the claim within two and a half minutes after his name was drawn, and because the drawings might be held inside the theater as well as outside. Moreover, the inducement to buy a ticket to see the movie was quite strong to the person who was present for the drawing.

There is little doubt that there is consideration in the referral selling operation described above. Under the McEwan rationale, had the referral selling plan required merely that the purchaser "founder" pay the actual retail price of the goods purchased as a condition to participation in the plan, the requisite consideration would have been present. In McEwan, supra, the most a person would have had to pay was the regular price of a ticket to enter the theater and see the movie. See also State vs. Mumford, 73 Mo. 647 (1881). Here, the founder pays a sum in addition to the retail price of an article he purchases; this sum is an added consideration for participation in the referral scheme.

Moreover, the referral selling scheme clearly involves a prize. Again, Missouri's courts have construed this term most liberally. See, e.g., State ex rel. Home Planners Depositary vs. Hughes, 299 Mo. 529, 253 S.W. 229 (1923) calling the offering of below-market interests rates to participants in a lending plan sufficient to constitute the offering of a prize. It would seem certain in the light of Hughes that any plan whereby a person is offered the chance to make large amounts of money over and above his payment for that opportunity, involves the offer of a prize. While the participant "founder" does extend some effort in obtaining the prize, such effort is not determinative for this purpose. In State ex inf. McKittrick vs. Globe-Democrat Publishing Company, supra, the prize depended upon substantial effort in the solution of difficult rebus puzzles. It was held nevertheless that a prize was involved.

It is more difficult to find that this referral selling scheme involves an element of chance sufficient to label it a lottery. Again, the Globe-Democrat case, supra, supplies the necessary standard. In that case the defendant publishing company published a series of cartoons which were to be interpreted to arrive at "famous names." The cartoons include persons, things, and words. The contestant was to "solve" the cartoon rebus by finding in it the parts of a word or set of words which made up a famous name. The initial set of cartoons was found to be rather simple, but subsequent sets became more and more difficult. It was found by the trial court that a great amount of skill was needed in the solution of these

Honorable John Crow

puzzles, but that sometimes an accurate guess was enough. Moreover, it was found that some of the most difficult puzzles were somewhat ambiguous--they could give rise to two or more different solutions of which one was supposedly "preferred." Hence, although it was minor as a quantitative matter, guess work and blind luck could give one person success and eliminate a substantial number of other contestants. The court held that this was sufficiently invested with the element of chance to be a lottery.

"...the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense.
..." (110 S.W.2d at 717)

In another case, State ex rel. vs. Hughes, supra, chance is seen as involving uncertainty with respect to the actual realization of the promised reward without any reasonable way in which to determine the probabilities of such realization. 253 S.W. at 231.

In other states, referral selling schemes have been held to be lotteries because they involve a substantial element of chance. However, in all of these cases, the customer was promised commissions only if a salesman of the seller contacted and sold the seller's products to (and in some cases enrolled as a "representative") the persons' whose names the customer supplied. It was not certain that the company's salesman would even contact these persons, nor was it clear that the salesman would represent the seller's product in an adequately persuasive manner to make the sale if, in fact, he did make the contacts. Skill or judgment on the part of the customer in selecting the names was not a predominant contributing factor in determining whether or not that customer would receive commissions. Sherwood and Roberts--Yakima, Inc., vs. Leach, 67 Wash.2d 630, 409 P.2d 160 (1966); Commonwealth vs. Allen, 404 S.W.2d 464 (Ky. 1966); Commonwealth vs. Campbell, 406 S.W.2d 730 (Ky. 1966); State vs. ITM, Inc., 52 Misc.2d 39, 275 N.Y.S.2d 303 (Usp. Ct. 1966); M. Lippincott Mortgage Investment Co. of Florida vs. Childress, 204 So.2d 919 (Fla. Dist. Ct. App. 1967).

Similar referral selling schemes, again involving minimal participation on the part of the referral customer in the "earning" of promised commissions were deemed not to be lotteries in Ohio.

Honorable John Crow

DeWitt Motor Company vs. Bodnark, 14 Ohio Op.2d 25, 169 N.E.2d 660 (Com. Pls. 1960) (dictum); Yoder vs. So-Soft of Ohio, Inc., 30 Ohio Op.2d 566, 202 N.E.2d 329 (Com. Pls. 1963) (The court held that the referral sales contract was a security, however); First Discount Corp. vs. Cua, 117 Ohio App. 105, 190 N.E.2d 695 (Ohio Ct. App. 1962). The Oklahoma Supreme Court also held the referral selling scheme not to be a lottery on the basis of a very close and highly technical reading of Oklahoma's lotteries statute. The statutes included referral selling schemes in which the purchaser "agrees" to secure future purchasers. There being no actual agreement so to do on the part of the referral buyer, there was no lottery. Krehbiel vs. State, 378 P.2d 768 (Okla. 1963); A. A. Murphy, Inc., vs. Taylor, 383 P.2d 648 (Okla. 1963). The major difference between the Washington, Florida, and Kentucky decisions, and the decisions of the Ohio courts is on their evaluation of the element of chance. The Ohio court in First Discount Corp. vs. Cua, supra, noted that "An element of chance permeates most of the affairs of men. . . ." and found that ". . . The analogy between the commissions provided in this agreement and the perfectly lawful overwriting commissions of the general agent, jobber, etc., on the sales of his subordinates, is a valid one, even though the representative here must depend upon persuasion alone without actual authority." (190 N.E.2d at 697).

In an opinion of this office issued on February 6, 1963 (No. 86), the rationale of the Sherwood and Roberts--Yakima, Inc. case and the cases following it was implicitly accepted and that of the DeWitt case and the subsequent Ohio cases was rejected. It was there that the element of chance adhered in the absence of control on the part of the buyer over the attainment of his commissions.

There was another feature of referral selling plans which was mentioned in the above opinion of this office and in the opinion of the court in Sherwood and Roberts--Yakima, Inc., supra, the referral buyer has no way of knowing the extent to which the market for the items sold is saturated. The multi-level and unlimited scope of the referral selling scheme made it impossible, at some point unknown to the buyer, for the buyer to recoup his investments much less make any profit. This "chance" feature inheres in and at some point in the proliferation of referral buyers, dominates the plan. Such domination by "chance" would occur whether or not the participants in the plan were expected to and did participate in the actual earning of their commissions. If a referral buyer enters into a referral selling plan without knowing or being able to know how many participants were already enrolled, and without any means by which a person experienced in the trade could test the remaining market and estimate his chance for success, he is relying more on luck than on skill to help him make his money.

Honorable John Crow

In State ex rel. vs. Hughes, 299 Mo. 529, 253 S.W. 229 (1923), this "chance" feature became part of the Missouri's definition of "lotteries." In that case, a person was given the opportunity to borrow money from a certain fund at below-market interests up to the face value of a certificate which he had to purchase. The certificate costs the holder \$4.00 per month for every \$500.00 of the face value. Paid up certificate holders could cash in their certificates for the face value plus a certain amount of earnings. Each certificate holder was allowed to borrow money in the order in which his application for certificate was made--down to the day, hour, and minute. Hence, his opportunity to borrow any substantial sum at the low interest rate depended in large part on the number of certificate holders who were eligible to and did borrow money from the fund beforehand. Holding this sufficient to import a dominating element of chance into the plan, the court said:

"It is manifest that the subscriber, while he knows the 'day, hour, and minute' his application for the certificate is made, cannot know the number of certificates which have been applied for preceding his application. Even if he knew the actual number which had reached the fiscal agency and had been listed, he could not know how many applications had been taken thereafter by relator's representatives and had not reached the office for listing. It follows he cannot know his rank or order in the matter of eligibility for a loan. . . . The value of his certificate depends in part upon the order in which it becomes eligible for a loan, . . ." (253 S.W. at 230-231)

The referral selling plan, with which this opinion is concerned, contains both the elements of chance found in the Hughes case and that found in the Washington, Kentucky, and Florida decisions discussed above whose reasoning is adopted by implication in the above official opinion issued by this office in 1963. The number of probable founders is limited to a percentage of the population in the trade area to be served by the seller's market center. This limits the risk on the part of each founder that the number of persons who might receive and use the purchase authority cards might be insufficient. On the other hand, as the number of founders grows in any given market area, the additional number of founders who may be enrolled decreases. Each subsequent enrollee is thus limited in the number of commissions which he might earn for the enrollment of other founders. There is apparently no way for the prospective founders to know (1) how many other founders have been enrolled in the area, or (2) how many founders are being enrolled and are being

Honorable John Crow

solicited now. That is, he has no way of ascertaining the possible market from which he expects to make his largest commission--the market for enrollees. Moreover, his ability in the future to enroll founders depends in a negative way directly upon the unforeseeable and uncontrollable (by him) ability of other founders to enroll founders. Not only the Hughes case, but also Sherwood and Roberts--Yakima, Inc. vs. Leach, supra, would serve as authority for the primacy of the chance feature here.

Chance is even more apparent when one considers the commissions earned by supervisors and commissions accruing from the change of status from distributor to supervisor. A supervisor has relatively little to say about what distributors in his "sales organization" do with their time. He has no coercive authority with regard to hiring and firing, either directly or indirectly, through reports to the seller concerning the distributor's behavior. While the distributor is obligated to use reasonable efforts to encourage purchase authority cardholders to make purchases, such obligation does not extend to the enrollment of founders. Moreover, such obligation as exists to serve the seller's interest is subject to the distributor's and supervisor's right to engage in other gainful employment. (See Master Founder Purchase Contract, paragraphs 11 and 13). The most a supervisor can do is exhort and persuade at sales meetings (at which attendance is apparently not required of distributors). Yet, a supervisor receives a commission, not only for founders which he enrolls, but also for founders which "his" distributors enroll. Moreover, a supervisor receives a commission (as does a distributor) for every founder whom he enrolled who becomes a supervisor; and, in addition, he receives a commission for every distributor who was enrolled by one of his distributors who becomes a supervisor. Unless the amount of his commissions warrant his spending a substantial amount of time on the job as supervisor (and hence away from his regular employment if such exists), it is highly doubtful that his efforts contribute to the enrollment of these indirect distributors or their elevation to supervisor. Since there is no limit to the number of distributors who become supervisors, the supervisor's commissions on the enrollment of indirect distributors and on sales made on purchase authority cards by "his" distributors is, therefore, also highly contingent on decisions made independently of his efforts.

Another source of commissions for founders is sales made to holders of purchase authority cards. It is the duty of each supervisor to encourage distributors to encourage holders of these cards to make purchases. The market center at which these purchases are to be made is not yet built. The quality of merchandise offered there and the salesmanship of the persons working at the center is still unknown. Much depends upon these two factors to determine

Honorable John Crow

the amount of money received by distributors and supervisors from sales at the market center, yet supervisors are given a twenty-five percent override on commissions earned by distributors from such sales. A supervisor is also given a commission of five percent of the sales made to holders of purchase authority cards which he distributed. Distributors receive a commission of four percent on such sales made to holders of cards distributed by them.

Distributors are encouraged to redistribute cards which are not used in any two quarter period (and we shall assume that cards remain the property of the seller in order to facilitate redistribution). Information concerning the use of purchase authority cards is given to the supervisor and distributors working in his "sales organization" to enable them to determine what effort is required to increase sales to holders of these cards. However, the number of actual purchases and the size of each purchase must depend upon the quality of the market center and its competitive position in the trade area. Moreover, the size of the commissions (subject to the five percent per card service charge) is sufficiently low to make any great sales effort on the part of the founder appear relatively unrealistic. Assuming that a distributor has distributed fifty purchase authority cards, and the holders of these cards make purchases at the market center averaging each \$100.00 per month, the distributor's commission would be \$200.00 per month less a monthly service charge of \$2.50. Yet the return from a single cardholder's purchases would only be \$4.00 per month. Thus, as a practical matter, chance is a dominate feature in the rewards accruing to the distributor from the actions of the cardholders.

The present inducement for enrollment of founders is clearly not the relatively minor earnings from sales to purchase authority cardholders at a market center not yet built. More clearly, the major inducement must be the opportunity to earn substantial commissions from the enrollment of other founders. As was suggested above, the chance factor in this aspect of the plan is quite clear and becomes even more clear as the number of enrolled founders increases.

The referral selling scheme, with which this opinion is concerned, does indeed come close to what might be characterized as the sale of a business opportunity. When a person buys a business, he is purchasing a chance to exploit it and profit from it in the future. His success or failure depends in large measure upon events in the future, and upon circumstances in large part beyond his control. A person entering into such a transaction nevertheless has or is an experienced businessman, can acquire information concerning present competition and market conditions, and can make certain assumptions about what will happen in the near future which will be fairly accurate. The kind of information on which similar relevant judgments are based is not available to the person enrolling

Honorable John Crow

as a founder. Moreover, the involvement or expected involvement of the purchaser of a business opportunity with a profitable operation of the business is of a far more intense and otherwise different nature than that of the founder with the earnings of commissions either from enrollment of other founders or from sales made to holders of purchase authority cards. While the kind of referral selling operation discussed here comes close, it does not appear to be the equivalent of such a legitimate transaction.

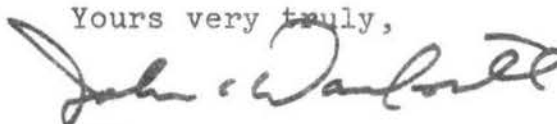
As was stated above, the constitutional status of Missouri's prohibition of lotteries urges a broad and effective interpretation of the elements which comprise a lottery: consideration, prize, and chance. As State vs. McEwan, supra, pointed out, the practical effect of a scheme or plan may be taken into account in determining whether the damning features are present. Moreover, the qualitative focus of State v. Globe-Democrat Publishing Company, supra, and the breadth of the definition of chance in State ex rel. vs. Hughes, supra, strongly suggest the dominance of the chance factors in the referral selling operation described in this opinion. As was noted, the element of chance is strongly present even in the area of commission earnings in which the founder purchasers are most directly involved--the recruiting and enrollment of other founders. For these reasons, it is the opinion of this office that the referral selling scheme described in this opinion is a lottery within the provisions of Sections 563.430 and 563.440, RSMo Supp. 1967.

CONCLUSION

It is the opinion of this office that the referral selling operation in which founder purchasers are promised commissions from the enrollment of other founder purchasers by them and from sales made to persons holding purchase authority cards distributed by such founders, or by persons within such founders' "sales organizations," in a market center yet to be built, is a lottery within the provisions of Sections 563.430 and 563.440, RSMo Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Dennis J. Tuchler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 86, Reardon,
2-6-63

THIRD AND FOURTH CLASS COUNTIES:
OWNING REAL ESTATE IN OTHER
COUNTIES:
SALE OF LAND BY SHERIFF:
REAL ESTATE:

The sheriff of any county in which real estate is located which is owned by another nonadjoining county of the third or fourth class in violation of section 49.285(1), must take possession of the land and sell it in the manner prescribed by section 49.285(1) unless otherwise ordered by a Circuit Court under section 49.285(2).

OPINION NO. 196

September 25, 1969

Honorable Granvil B. Vaughan
Missouri House of Representatives
Room 203B
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Vaughan:

We are in receipt of your request for an official opinion from this office asking whether the sheriff of a county has the power to sell land within its boundaries which is owned by another county of the third or fourth class.

Section 49.285, RSMo Cum. Supp. 1967, states:

"1. It shall be unlawful for any county of the third or fourth class to own real estate situated in any other county of this state other than a county which adjoins it after five years from October 13, 1963, or after five years from the date of acquisition of the real estate, whichever date last occurs. If any county subject to these provisions fails to dispose of such real estate within that time, the sheriff of the county in which the land is located shall take possession of the real estate and sell it at public auction from the place where and at the hour when partition sales are normally conducted after giving notice of the sale in the manner prescribed for partition sales both in the county where the land is located and in the county owning the real estate. . . ." (Emphasis added)

The statute quoted above makes it illegal for a third or fourth class county to own real estate in any non-adjacent county after five years from the date of acquisition of the land or from October 13, 1963, (whichever last occurs). In order to enforce the provisions of the statute, the sheriff is required to take possession of the unlawfully held land and sell it at a public auction. The

Honorable Granvil B. Vaughn

statute directs that the sheriff "shall" take possession of the land and sell it. Because the Missouri General Assembly has specifically directed the sheriff to take possession of and sell land held in violation of the statute, it is only logical to conclude that the sheriff need not seek or obtain any further order or authority in order to comply with Section 49.285. Of course, the sheriff must follow the procedure specified in the statute in conducting the sale.

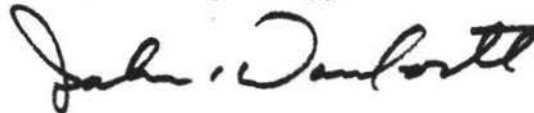
Section 49.285(2) provides that the Circuit Court of the county where the land is located may restrain the sheriff from enforcing the provisions of section 49.285(1) under certain circumstances. But as long as the sheriff is not under court order pursuant to section 49.285(2) it is his duty to take possession of and sell land which is held in violation of section 49.285(1).

CONCLUSION

It is the opinion of this office that the sheriff of any county in which real estate is located which is owned by another non-adjointing county of the third or fourth class in violation of section 49.285(1), must take possession of the land and sell it in the manner prescribed by section 49.285(1) unless otherwise ordered by a Circuit Court under section 49.285(2).

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas D. Vaughn.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent than the last name "Danforth".

JOHN C. DANFORTH
Attorney General

COUNTY CHARTER COMMISSION:
COUNTY OFFICERS:
NECESSARY GOVERNMENTAL
EXPENSES:
COUNTY LIABILITY OR
REIMBURSEMENT FOR EXPENSES:
CONSTITUTIONAL LAW:

The Clay County Court is authorized to expend county funds to meet the necessary expenses incurred by the Clay County Charter Commission in the performance of its official duties. Necessary expenses do not include fees for professional advice and services meals consumed, clothing depleted or commutation expenses incurred by commission members. Nor

may the county use its funds in any way to compensate members of the commission for their services.

OPINION NO. 198

July 10, 1969

Honorable P. Wayne Kuhlman
Assistant Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068



Dear Mr. Kuhlman:

This opinion is in response to your letter of recent date in which you request an official opinion from this office on the following question:

"The Clay County Charter Commission was appointed by the Clay County Court October 25, 1968, to draft a charter for submitting to the voters of Clay County. Is the Clay County Court authorized to expend county funds to support the Charter Commission?"

Subsequent to your request, your office furnished this office with the following budget of the Clay County Charter Commission:

Clerical Salaries	\$1,000.00
Printing	500.00
Professional Services	5,000.00
Office Supplies	250.00
Postage	150.00
Contingent Fund	200.00
TOTAL	\$7,100.00

Article VI, Section 18 of the Constitution of Missouri permits the establishment of charter government for counties having population in excess of eighty-five thousand inhabitants. Article VI, Sections 18(f) and (g) provide for the drafting of proposed county charters by commissions appointed by the judges of the circuit and probate courts pursuant to petition.

Honorable P. Wayne Kuhlman

Article VI, Section 18(g) specifically provides:

"Within sixty days thereafter said judges shall appoint a commission to frame the charter, consisting of fourteen freeholders who shall serve without pay and be equally divided between the two political parties casting the greater number of votes for governor at the last preceding general election."

Thus, two relevant points are quite clear: (1) Charter commissions are charged by the Constitution with performing an important governmental function for the counties, i.e., establishing a vehicle for peaceful change of the structure of county government, and (2) the members of such commissions are to serve without compensation for their services. Nothing is stated in the Constitution regarding the necessary expenses of such commissions.

However, Section 49.510, RSMo provides:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

If then members of the Clay County Charter Commission may be said to be county officers, the commission is entitled to support for its work from county funds at least to the extent specifically required by Section 49.510, RSMo. Since the commission is provided for by the Constitution and charged with a vital county governmental function and since the members of the commission were appointed by the judges of the Circuit and Probate Courts, it is the opinion of this office that the members of the commission are "officers of the county" within the meaning of Section 49.510 RSMo.

The question remains whether expenses necessary to the operation of the commission incurred by members beyond those specifically provided for by Section 49.510 RSMo, for instance travel expenses of members (other than expenses for commutation to and from a member's place of residence) and long distance telephone charges, may be met from County funds.

While it may be argued that by designating certain necessary expenses of county officers to be met from county funds, other necessary expenses are excluded from similar consideration unless provided for else where, this office takes the view that Section 49.510, RSMo is merely intended to provide minimum support for county officers

Honorable P. Wayne Kuhlman

and does not preclude the expenditure of county funds to meet other expenses necessarily incurred by county officers in the performance of their duties. See Rinehart v. Howell County, 348 Mo. 421, 425, 153 SW 2d 381, 383 (1941).

A liberal construction of Section 49.510 RSMo comports with the wise public policy of encouraging competent adult citizens of Missouri to participate actively in local governmental affairs.

Our conclusions, that Section 49.510 RSMo, does not preclude county funds from being used for the purpose of paying necessary expenses incurred by County Charter Commissions in the conduct of their business beyond those expenses specifically provided for in the said statute and that the county has the authority to appropriate public funds for such purposes, are supported by the cases of Ewing v. Vernon County, 216 Mo. 681, 116 SW 518 (1909) and Rinehart v. Howell County, 348 Mo. 421, 153 SW 2d 381 (1941).

In Ewing the plaintiff, a former Recorder of Deeds, sued Vernon County for the amount expended by him to obtain janitorial services for his office and for the amount expended by him for postage stamps used to mail documents back to members of the public following recordation. No statute provided specifically for such expenses incurred by the Recorder. Nevertheless, the Supreme Court ruled that the plaintiff was entitled to reimbursement for meeting these expenses out of his own pocket. In so ruling, the Court said, Mo. l.c. 695:

"The conclusion we have come to comports with the general doctrine announced in 23 Am. & Eng. Ency. of Law (2d Ed.) p. 338. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed to him. Provisions against increasing the compensation of officers do not apply to such cases. . . .'"

The same reasoning applies to County Charter Commissions, which are performing a necessary governmental function.

In the case of Rinehart v. Howell County, supra, the plaintiff, prosecuting attorney for Howell County, sued the county for reimbursement of reasonable sums paid for necessary stenographic services incurred in the discharge of his official duties. While certain sections of the Missouri Revised Statutes of 1939 authorized and established salaries for stenographic services to prosecuting attorneys in the larger counties of the state, they made no provision for like services in lesser populated counties such as Howell. The county refused to reimburse the prosecuting attorney, contending, inter alia, that payment for such services

Honorable P. Wayne Kuhlman

in the smaller counties was precluded by these sections.

In affirming the trial court's judgment for the prosecuting attorney, the Supreme Court rejected the argument that the statutes relied on by the county precluded payment for needed stenographic services.

The court said, SW l.c. 383:

" . . . Such enactments, . . . should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. . . ."

This same reasoning refutes the contention that Section 49.510, RSMo 1959, limits the counties as to the support they may provide to county officers. This statute merely relieves the counties of the burden of deciding in each case the propriety of expenditures for services listed in Section 49.510.

In addition to deciding that the statutes cited by the county did not preclude reimbursement, the Supreme Court held that the necessary expenses incurred by county officials in the course of performing their official duties were the responsibility of the county, following closely the reasoning of the Ewing case, supra. See Missouri Attorney General Opinion No. 4 of April 1, 1969, rendered to Weber, a copy of which is enclosed.

While this office is of the opinion that the expenses necessary to support the operation of the Clay County Charter Commission may be met from county funds, it must be indicated that not all expenses incurred by the members of the commission in the course of discharging their responsibilities may be considered "necessary" expenses so as to be the responsibility of the county. Included in the charter commissions budget is an item for "professional services" of \$5,000. This sum is to be paid by the charter commission for legal and other professional advice and services. It is the view of this office that such payment is not a necessary expenditure.

It must be presumed that the circuit and probate judges selected as commissioners persons competent and able to frame a charter without hiring private experts to help them. This being so, they are without authority to hire others to discharge or aid in discharging their responsibilities.

Honorable P. Wayne Kuhlman

If legal advice is needed by the commissioners, they may obtain it only from the county prosecuting attorney. Section 56.070, RSMo 1959 provides in pertinent part:

"The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. He shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court or any judge thereof, except in counties in which there is a county counselor."

Since we have already determined the commissioners to be county officers, it is to the Prosecuting Attorney of Clay County that they must turn for their legal advice. See Missouri Attorney General Opinion No. 131, June 26, 1964, in which this office held that a county planning commission may not employ private legal counsel but must rely upon the advice of the prosecuting attorney in counties of the second class. And, as the statute plainly states, the advice sought from the prosecuting attorney must be given by him without fee. We enclose a copy of such opinion.

While not included in the Charter Commission's budget, it should also be noted that reimbursement for meals consumed and clothing depleted by the Charter Commissioners during their service is not a necessary expenditure. St. Louis County Court v. Ruland, 5 Mo. 268 (1838); Ewing v. Vernon County, supra. Nor is the county responsible for a member's travel expenses in traveling to any place in the county at which the day to day work of the commission is conducted or meetings of the commission are held. See Missouri Attorney General Opinion No. 4, April 1, 1969. Finally, it hardly needs to be said that members of the commission may not be compensated for their service to the county in the guise of paying "expenses" cast in the form of wages or income lost as a result of service on the commission. Missouri Constitution, Article VI, Section 18(g).

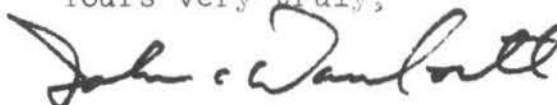
CONCLUSION

It is, therefore, the opinion of this office that the Clay County Court is authorized to expend county funds to meet the necessary expenses incurred by the Clay County Charter Commission in the performance of its official duties. Necessary expenses do not include fees for professional advice and services, meals consumed,

Honorable P. Wayne Kuhlman

clothing depleted or commutation expenses incurred by the commission members. Nor may the county use its funds in any way to compensate members of the commission for their services.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Encl: No. 4, 4-1-69, Weber
No.13, 6-26-64, Hollingsworth



June 24, 1969

OPINION LETTER NO. 199

Honorable Herman Julien
Director
Division of Employment Security
Department of Labor and Industrial Relations
P. O. Box 59
Jefferson City, Missouri 65101

Dear Mr. Julien:

Reference is made to your request which request reads in part as follows:

- Question "Does Section 296.020, RSMo Supp. 1967, preclude this Division
No. 1 from recording information pertaining to race, sex, color or
national origin on applications and/or other forms to be
used for non-discriminatory purposes?"
- Question "Is said statute in conflict with the recording requirements
No. 2a-e of Title VII of the Civil Rights Act of 1964 (2000d et. seq.)
the Wagner-Peyser Act (29 U.S.C.A. 49K) and the Social
Security Act (42 U.S.C.A. Sec. 301 et. seq.), and the Regu-
lations of the Secretary of Labor, and if so, is it encum-
bent upon this Director to comply with the Federal require-
ment to record such information under the principle of
Federal supremacy?"

We deem it unnecessary to determine whether the provisions of Section 296.020, RSMo Supp. 1967, conflict with federal statutory requirements that the Division of Employment Security record information pertaining to race, sex color or national origin on applications and/or other forms to be used for non-discriminatory purposes.

If there is any conflict between Section 296.020 and the federal statutory requirements, the federal requirements prevail.

Article VI, clause 2 of the Constitution of the United States states in part:

"* * *This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the

Honorable Herman Julien

the United States, shall be the supreme Law of the Land. . . ."

The Supreme Court of the United States has long held that any State law which conflicts with the Constitution or laws of the United States is a nullity. Gibbons v. Ogden, 9 Wheat. 1, 210, 211 (1824). Moreover, the Supreme Court has found that where Federal regulations promulgated pursuant to authority conferred by Federal Statute conflict with State laws, the Regulations have the force of law and have supremacy over the State Statute. Public Utilities Commission v. United States, 355 U.S. 534, 542-545 (1958)

The Supreme Court has considered statistical data to be relevant to the determination of whether unlawful employment practices have been or are being committed. Cassell v. Texas, 339 U.S. 282, 284-286 (1950). Therefore, the regulation by the Commission that statistical data be recorded and reported is both valid and supreme over conflicting state law.

Therefore, it is the opinion of this office that the Division of Employment Security may record information pertaining to race, sex, color, or national origin on applications and other forms to be used for non-discriminatory statistical purposes.

Yours very truly,

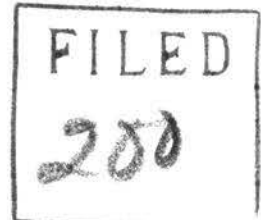
JOHN C. DANFORTH
Attorney General

COUNTY COURT:
COUNTY EMPLOYEES:

If only the presiding judge and one other judge of the County Court are present, the presiding judge may proceed to hire an employee for the county although the other judge votes against such hiring. When all judges are present, and one judge is disqualified to act by reason of his relationship to a prospective employee, the presiding judge may hire said employee although the other judge may vote against said hiring.

May 20, 1969

OPINION NO. 200



Honorable William C. Batson, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri 63901

Dear Mr. Batson:

This is in answer to your request for a formal opinion concerning the following questions:

"1. If only the presiding judge and one other judge of the County Court is present, may the presiding Judge under Section 49.070 RSMo 1959, proceed to hire an employee for the county if the other Judge votes against such hiring?"

"2. Where all three judges are present, and one judge abstained from voting on the hiring of an employee due to close kinship of the said employee, could the presiding judge hire said proposed employee under Section 49.070 RSMo 1959, if the other judge voted against hiring said proposed employee?"

In answer to question number one, it is apparent that if only two judges are present, the decision of the presiding judge shall stand as the decision of the court. The section of the statutes under consideration is clear and precise on this point and states as follows:

". . . when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge shall stand as the decision of the court."

An employment contract would be treated as any other matter to be considered by the court, and the presiding judge could under the circumstances outlined in question one, proceed to hire an employee for the county though the other judge votes against such hiring.

In answer to question two, the interested judge, being related to the prospective employee is under an obligation to disqualify himself. *Weston Benefit Assessment, Etc., v. Weston Special Benefit Assessment Road District of Platte County*, 294 SW2d 353 (KCCA 1956); *State ex rel Morrison v. Staton*,

Honorable William C. Batson, Jr.

138 SW 337 (Mo. 1911). The term disqualify as pertains to judges and administrative decision makers, means simply to divest or deprive of qualifications; to incapacitate; to render ineligible or unfit. Carroll v. Green, 47 N.E. 223 (Ind 1897); Coats v. Benton 194 P 198, 200 (Okla 1921); 19 ALR 1038.

Upon the disqualification of the related judge, the court would have but two judges sitting to decide the issue before the court, to wit: The employment contract. The statutory language defining the procedure when but two judges are sitting would come into effect and the decision of the presiding judge would then be the decision of the court.

In the event majority of the judges should be interested in any cause before them, the same should then be certified to the Circuit Court to judge and determine the matter, in accordance with 49.220 RSMo 1959.

CONCLUSION

If only the presiding judge and one other judge of the County Court are present, the presiding judge may proceed to hire an employee for the county although the other judge votes against such hiring.

When all judges are present, and one judge is disqualified to act by reason of his relationship to a prospective employee, the presiding judge may hire said employee although the other judge may vote against said hiring.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jack O. Edwards.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter - Hoecker

September 23, 1969

OPINION LETTER NO. 204

Mr. George W. Flexsenhar, Director
Division of Industrial Inspection
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Flexsenhar:

This letter is in response to your request for an opinion. On September 20, 1962, official opinion No. 218 was written holding that the Frederick Chusid & Company was required to be licensed by the Division of Industrial Inspection because such company was engaged in representing employers in obtaining employees as well as representing employees securing employment for which services the company charged a fee.

You state that such company is now engaged only in offering professional career counseling service.

A professional career counseling firm offers services designed to assist the client in analyzing his strengths and his goals with respect to his career and to relate these to the realistic needs of the business world. This generally involves psychological testing and evaluation. If these are the only services offered to the public the firm or corporation need not obtain an employment agency license. However, as pointed out in official opinion No. 218, 1962, whenever a firm or corporation in this state offers the services of an employment office or agency for hire in addition to the psychological testing and evaluation it must first obtain a license pursuant to Section 289.010, RSMo.

A firm or corporation may provide psychological career counseling in Missouri without obtaining a license under Section 289.010, RSMo. However, the services must be offered to the

Mr. George W. Flexsenhar

public as such. The firm or corporation may not engage in the practice of representing that it will provide the services of an employment agency or that it will assist the person in obtaining employment in any manner without first obtaining a license.

Yours very truly,

JOHN C. DANFORTH
Attorney General

STATE HIGHWAY DEPARTMENT:
OVERTIME COMPENSATION:

Overtime compensation can be paid by the Missouri State Highway Commission to maintenance employees who are required to work overtime for snow and ice removal and for other emergency highway work such as repair or reconstruction of washed out bridges.

OPINION NO. 209

June 5, 1969



Robert L. Hyder, Esquire
Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri 65101

Dear Mr. Hyder:

This official opinion is issued in response to the request contained in your letter dated March 18, 1969.

The question is whether maintenance employees of the State Highway Commission who are required to work overtime for snow and ice removal or for other emergency highway work, such as repairing or reconstructing washed out bridges, may be compensated for such overtime work.

Your letter states that the State Highway Commission adopted a policy in the fall of 1968 pursuant to which overtime compensation is being paid to such employees for such work.

Section 226.080, RSMo 1959, makes express provision for payment of salaries or compensation to employees of the State Highway Commission. Likewise, the amount of such compensation is to be fixed by the Commission within certain guidelines set forth in the statute. Chapter 226, RSMo 1959, State Highway Department, Section 226.080, in pertinent part, provides as follows:

"Salaries of employees.--* * * salaries of department heads, engineers, clerks, and other employees shall be fixed by the commission, except that the compensation of clerical or other non-technical employees of the department shall not exceed that of those in similar

Robert L. Hyder, Esquire

employment in other departments of the state. Preference shall be given, other conditions being equal, to employment of honorably discharged members of the armed services, but any other preference or discrimination in connection with employment is declared to be unlawful."

The State Highway Department is not one of the state government departments or agencies covered by The State Merit System Law. Section 36.030, RSMo 1959. Furthermore, employees of the State Highway Department are not covered by the Fair Labor Standards Act of 1938 providing for minimum wages and overtime compensation. This act defines the term "employer" so as to exclude the United States or any State or political subdivision of a State. Section 3(d), 52 Stat. 1060 (1938).

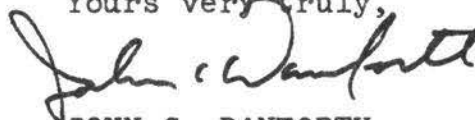
The Missouri statutes relating to the State Highway Department and the Commission indicate that the State Highway Commission shall and does have broad discretion with respect to hiring, discharging, fixing work duties and compensation of its officials and employees. In our view, the language used in Section 226.080, RSMo 1959, to the effect that compensation of non-technical employees of the department shall not exceed that of those in similar employment in other departments of the state does not prohibit payment of compensation for overtime work of the character mentioned hereinbefore. The laws of Missouri do not establish a basis or standard of payment for this or any similar employment in other departments. The type of work and the circumstances under which it must be performed are unique to this agency.

CONCLUSION

Therefore, it is the opinion of this office that overtime compensation can be paid by the Missouri State Highway Commission to maintenance employees who are required to work overtime for snow and ice removal and for other emergency highway work such as repair or reconstruction of washed out bridges.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,



JOHN C. DANFORTH
Attorney General

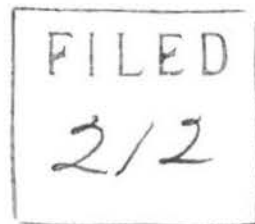
HOUSING AUTHORITY:
OFFICERS:

A tenant, is not eligible to be appointed to the office of commissioner in a municipal housing project created under provisions of Chapter 99, RSMo 1959.

August 11, 1969

OPINION NO. 212

Honorable Jack E. Gant
Senator, 16th District
9517 East 29th Street
Independence, Missouri



Dear Senator Gant:

This opinion is written to respond to your request for an opinion on whether there is a conflict between Sections 110 and 204 of the Housing & Urban Development Act of 1968, and Section 99.060, RSMo 1959. Your specific inquiry is whether a tenant of a Housing Authority created under Chapter 99 RSMo can be one of the commissioners of the authority.

Section 99.060, RSMo 1959, reads as follows:

"No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he immediately shall disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure so to disclose such interest shall constitute misconduct in office. Upon such disclosure such commissioner or employee shall not participate in any action by the authority affecting such property."

Honorable Jack E. Gant

Section 110 of the Housing & Development Act of 1968, (Pub Law 90-448) deals, in summary, with the establishing of the National Advisory Commission on Low Income Housing, its composition, the appointment of its members, etc. We see no conflict in any area with Section 99.060, set out above.

Section 204, as amended, of the Housing & Development Act of 1968 provides in part that:

"The Secretary is authorized to enter into contracts to make grants to public housing agencies to assist, where necessary, in financing tenant services for families living in low-rent housing projects. In making such contracts and grants, the Secretary shall give preference to programs providing for the maximum feasible participation of the tenants in the development and operation of such tenant services. For purposes of this paragraph the term 'tenant services' includes the following services and activities for families living in low-rent housing projects: counseling on household management, housekeeping, budgeting, money management, child care, and similar matters; advice as to resources for job training and placement, education, welfare, health, and other community services; services which are directly related to meeting tenant needs and providing a wholesome living environment; and referral to appropriate agencies when necessary for the provision of such services. * * *" (Emphasis ours)

Again, we have carefully perused Section 204, supra, and we see no conflict with Section 99.060. It is our view that the Missouri statute governs the qualifications of a public officer of an agency created by the State in the absence of a constitutional prohibition or an area preempted by legislation of the federal government.

Section 99.060, may be summarized as prohibiting a commissioner from exercising his authority and judgment on any matter in which he has an interest in the housing project. As a tenant, his interest would encompass the entire operation of the project from the amount of rent to the state of repair and sanitation. We see no area, as a practical matter, where the tenant does not have an interest in the housing project.

We believe that the phrase "interest direct or indirect in any housing project" applies to the relationship a commissioner has which would affect his official actions because of

Honorable Jack E. Gant

his determination of matters affecting himself as a tenant and is not limited to contracts for services or materials to be furnished by him or his interest in property of the project. Section 99.060, specifically prohibits a commissioner having any interest in any project property or project contract but goes further and prohibits his having any interest in a housing project. This "interest" proscribed by the statutes demonstrates a legislative intent to prohibit a commissioner from having an interest in the project as a tenant which in turn could affect his actions as commissioner in any way.

In interpreting this section, we may not attempt to supply, insert or read words into a statute unless there is an obvious omission or unless the statute is incongruous, unintelligible or leads to absurd results. May Dept. Stores Co. v. Weinstein, 395 SW2d 525. We are bound to read this statute so as to give the words their plain and ordinary meaning. Rosedale-Skinker Imp. Assn. v. Board of Adjustment of the City of St. Louis, 425 SW2d 929. The statute appears clear and precise. As we read the above section, a tenant would be precluded from acting as a commissioner in matters of operation of the project because of his direct, personal interest as a tenant. This would include any interest and would appear to cover the entire spectrum of operation of the project.

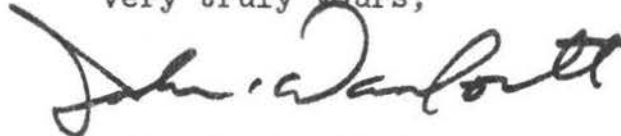
Any change of the statutes in its application or qualifications of the commissioners should be addressed to the legislature. We conclude that Section 99.060, RSMo 1959, would apply and its provisions define the qualifications of a commissioner of the housing authority.

CONCLUSION

It is the opinion of this office that a tenant is not eligible to be appointed to the office of commissioner in a municipal housing project created under provisions of Chapter 99, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Very truly yours,



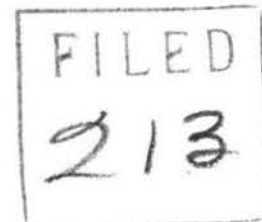
JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:
CRIMINAL LAW:
DRIVERS' LICENSES:

If a person operates a motor vehicle when his driver's license is suspended under Chapter 303, RSMo, "The Safety Responsibility Law," he is in violation of Section 303.370, RSMo 1959, and not Section 302.321, RSMo Supp. 1967.

OPINION NO. 213

April 29, 1969



Honorable James S. Stubbs
Prosecuting Attorney
Livingston County
Court House
Chillicothe, Missouri 64601

Dear Mr. Stubbs:

This is in reply to your request for an official opinion of this office concerning the question whether Section 302.321, RSMo Supp. 1967, applies when a person has had his driver's license suspended under Chapter 303, RSMo.

Chapter 303 is "The Motor Vehicle Safety Responsibility Law." Section 303.010, RSMo 1959. Basically, this law provides that an operator of a motor vehicle involved in an accident on the streets and highways of Missouri in which injury or property damage in excess of one hundred dollars occurs must file a report with the Director of Revenue. Section 303.040, RSMo 1959. Section 303.030, RSMo Supp. 1967, provides for the suspension of drivers' licenses and registration plates unless financial security or release from liability is proven.

Chapter 302, RSMo, provides for drivers' and chauffeurs' licenses. This law provides for the suspension or revocation of drivers' licenses for assessment of points after receipt of notice of convictions for certain motor vehicle violations. Sections 302.302, 302.304, and 302.160, RSMo Supp. 1967.

The statute that is in question in this opinion, Section 302.321, provides criminal sanctions against someone who drives while his license has been suspended or revoked under Chapter 302. Section 302.321 reads:

Honorable James S. Stubbs

"Any person whose operator's or chauffeur's license, or driving privilege as a nonresident, has been canceled, suspended or revoked as provided in this chapter, and who drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended or revoked, is guilty of a misdemeanor and on conviction therefor shall be punished by confinement in the county jail for a term not exceeding one year. This section shall not apply when the operator's or chauffeur's license, or driving privilege as a nonresident, has been canceled, suspended or revoked under chapter 303, RSMo."

Therefore, it is our opinion that if a person operates a motor vehicle when his driver's license is suspended under Chapter 303, he is not in violation of Section 302.321 but instead is in violation of Section 303.370, RSMo 1959, which provides in part:

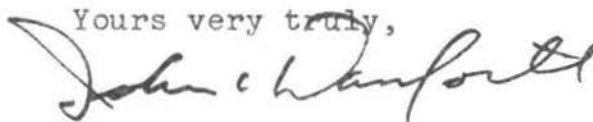
"Any person whose license or registration or nonresident's operating privilege has been suspended or revoked under this chapter and who, during such suspension or revocation drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this chapter, shall be fined not more than five hundred dollars or imprisoned not exceeding six months, or both."

CONCLUSION

It is the opinion of this office that if a person operates a motor vehicle when his driver's license is suspended under Chapter 303, RSMo, "The Safety Responsibility Law," he is in violation of Section 303.370, RSMo 1959, and not Section 302.321, RSMo Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

PHARMACISTS:
JURIES:

It is the opinion of this office that pharmacists are exempt from jury duty under the provisions of Section 338.160, RSMo.

June 5, 1969

Opinion No. 214

Honorable Lloyd W. Tracy, Secretary
Missouri State Board of Pharmacy
911 Dunklin Boulevard
Jefferson City, Missouri 65101



Dear Mr. Tracy:

This is in answer to your recent letter in which you asked whether Section 338.160, RSMo 1959, which exempts pharmacists from jury duty, was repealed by implication upon the enactment of Senate Bill No. 246 by the 70th General Assembly of Missouri.

Section 338.160 provides:

"All persons licensed under sections 338.010 to 338.190 as pharmacists and actively engaged in the practice of their profession shall be free and exempt from jury duty in all the courts of this state."

This provision was enacted in 1909, Laws 1909, page 478. It has never been expressly repealed.

Prior to the adoption of Senate Bill No. 246, Section 494.020 of the statutes included druggists as one of several occupations that were exempt from service on any jury. It seems clear that a licensed pharmacist would have been considered a druggist under this provision. State v. O'Kelly, 258 Mo. 345, 167 S.W. 980 (1914); State v. Clinkenbeard, 142 Mo. App. 146, 125 S.W. 827 (1910); State v. Donaldson, 41 Minn. 74, 42 N.W. 781 (1889).

Senate Bill No. 246 revised the statutory provisions relating to qualifications and disqualifications of jurors and exemptions from jury service. The general provisions for exemption from jury

Honorable Lloyd W. Tracy

duty are now found in Section 494.031, RSMo 1959, as a result of the changes made by Senate Bill No. 246. This section contains a lengthy list of persons who may be excused from jury duty upon timely application. Although paragraph three of Section 494.031 specifically exempts those engaged in the practice of medicine, osteopathy, chiropractic or dentistry, there is no mention in Section 494.031 of pharmacists or druggists. Your letter asks if the omission of pharmacists from the list of occupations mentioned in Section 494.031 constitutes an implied repeal of Section 338.160, which expressly exempts licensed pharmacists from jury duty.

A long series of Missouri cases has held that repeals by implication are not favored. See e.g. International Business Machine Corporation vs. State Tax Commission, 362 S.W.2d 635 (Mo 1962); State ex rel Preisler v. Toberman, 364 Mo. 904, 269 S.W. 2d 753 (1954). In City of Nevada v. Bastow, 328 S.W.2d 45 at 49 (K.C. App. 1959), the court quoted from C.J.S. as follows:

"It will be presumed that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject; and, where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes as to preclude the presumption * * * "

The opinion in Riley v. Holland, 362 Mo. 682, 243 S.W.2d 79 (1951) quotes the following language from State ex rel George B. Peck Co. v. Brown, 340 Mo. 1189, 105 S.W.2d 909, 911:

"Repeals by implication are not favored-- in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand."

Thus, there was no repeal by implication unless there is irreconcilable conflict between Section 338.160 and Senate Bill No. 246.

Honorable Lloyd W. Tracy

Both must stand if they can be construed so as to operate without conflicting. A comparison of Section 338.160 and Senate Bill No. 246 reveals no irreconcilable conflict. Assuming for purposes of analysis that the deletion of the term "druggist" was deliberate rather than an oversight, there is still no clear inconsistency. It was pointed out earlier in this opinion that pharmacists would be included within the term "druggist". The word "druggist" appears to be broader than the word "pharmacist", however, and the intention of the legislature in deleting "druggist" might have been to repeal the provision for excusing druggists who are not pharmacists. The following language from the opinion in State v. Clinkenbeard, 142 Mo. App. 146, 125 S.W. 827, 829 (Spr. Mo. App. 1910), lends support to this possibility:

"It was there held (referring to State v. Chipp, 121 Mo. App. 556, 97 S.W. 236) that 'druggist' and 'dealer in drugs' are synonymous terms, and that one may be a 'druggist' or a 'dealer in drugs' without being a registered pharmacist * * *"

Moreover, to construe Senate Bill No. 246 as not repealing Section 338.160 by implication, would not impair the operation of Senate Bill No. 246. Senate Bill No. 246 made a number of important changes. For example, while Section 494.020 exempted the listed persons from jury duty, the new language of Section 494.031 provides that listed persons shall be excused only upon timely application. This and other changes would not be affected by the continued existence of the exemption provided for in Section 338.160.

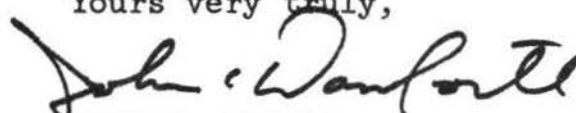
Since Section 338.160 and Senate Bill No. 246 are not in irreconcilable conflict, Section 338.160 was not repealed by implication. Therefore, it is the opinion of this office that pharmacists are exempt from jury duty under the provisions of Section 338.160.

CONCLUSION

It is the opinion of this office that pharmacists are exempt from jury duty under the provisions of Section 338.160, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James E. Westbrook.

Yours very truly,


JOHN C. DANFORTH
Attorney General

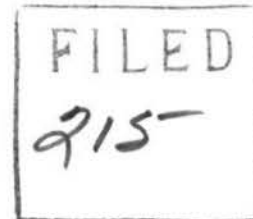
PROSECUTING ATTORNEYS:
CONSTITUTIONAL LAW:
UNITED STATES COMMISSIONER:

Under Article VII, §9 of the Constitution of Missouri, a person may not hold the office of prosecuting attorney and that of United States Commissioner at the same time.

OPINION NO. 215

October 16, 1969

Honorable Winston V. Buford
Prosecuting Attorney
Shannon County Court House
Eminence, Missouri 65466



Dear Mr. Buford:

This is in response to your request for an official opinion on the question whether a prosecuting attorney may accept an appointment as a United States Commissioner and retain the office of prosecuting attorney upon the condition that said prosecuting attorney would not receive a salary but would retain the office and expenses as provided by law.

Article VII, §9, Constitution of Missouri provides:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."

The substance of your question is whether a person who performs the duties and exercises the powers of the office of prosecuting attorney may escape this language of the Constitution by not claiming or drawing the compensation fixed by law for that office.

The Supreme Court of Missouri has held that "... to permit public officers, elected or appointed, to receive, by agreement or otherwise, a less compensation for their services than fixed by law, would be contrary to the public policy of this state. . . ." *Reed v. Jackson County* 142 S.W.2d 862, 865 (Mo. en banc 1940).

An office of profit is one to which is attached a compensation for services rendered. 67 C.J.S., §3, n. 104. Inasmuch as the legislature has attached a compensation to the office of prosecuting attorney, it is clear that the legislature intended the office of prosecuting attorney to be an office of profit. Moreover, in view of the decision of the court in *Reed v. Jackson County*, *supra*, it is equally clear that an incumbent prosecuting attorney has no power

Honorable Wintson V. Euford

to transform that office from one of profit to an honorary office by not claiming or drawing the compensation fixed by law for that office. It appears therefore that a prosecuting attorney who performs the duties and exercises the power of that office, but who does not claim or draw the compensation fixed by law for such services, nevertheless holds an office of profit within Article VII, §9 of the Constitution of Missouri. As stated in Opinion No. 382 issued to you on October 29, 1968, there can be no doubt that a United States Commissioner appointed pursuant to 28 U.S.C.A., §631 must be considered a holder of an office of profit under the United States.

CONCLUSION

In view of the foregoing, it is the opinion of this office that under Article VII, §9 of the Constitution of Missouri, a person may not hold the office of prosecuting attorney and that of United States Commissioner at the same time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

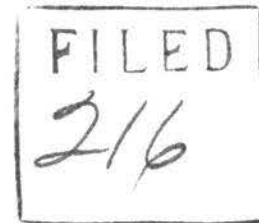
Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent part.

JOHN C. DANFORTH
Attorney General

OPINION LETTER NO. 216
Answered by Klaffenbach

August 4, 1969



OPINION LETTER NO. 216

Honorable A.J. Seier
Prosecuting Attorney
Cape Girardeau County Courthouse
Cape Girardeau, Missouri 63701

Dear Mr. Seier:

This acknowledges receipt of your recent letter requesting an opinion from this office as to whether or not there would be a violation of Article VII, Section 6, of the Missouri Constitution for a coordinator of a local organization for disaster planning for Civil Defense, appointed under Section 44.080, RSMo Supp. 1967, to appoint for service with and for the local civil defense unit, either his wife as a paid secretary or his son to a paid janitorial position.

Section 44.080 provides inter alia for the appointment of a coordinator for the local organization. His duties are therein set out in general terms. The constitutional provision applicable is Section 6 of Article VII, which provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment.

Both the wife and the son of the coordinator come within the fourth degree of relationship. State v. Ellis, 325 Mo. 154; 28 S.W.2d 363.

This leaves for determination only the question of whether or not the coordinator comes within the meaning of the constitutional nepotism provision quoted above. By its terms, the constitutional provision applies to any public officer or employee, who

Honorable A.J. Seier

makes an appointment by virtue of his office or employment, and this includes the coordinator.

In our view therefore, the employment of such persons under these circumstances would constitute a violation of the nepotism prohibition of the Constitution.

Yours very truly,

JOHN C. DANFORTH
Attorney General

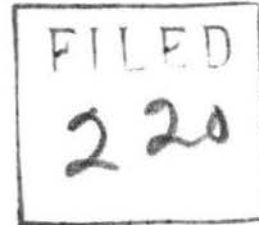
POLLING PLACES:
ELECTIONS:
COUNTY CLERKS:
ELECTION BOARDS:

County clerks, boards of election commissioners or other proper election officials are not required to designate tax supported public buildings to be used as polling places under the provisions of Section 111.257 RSMo. Supp. 1967.

OPINION NO. 220

June 9, 1969

Honorable Peter H. Rea
Prosecuting Attorney
Taney County
Branson, Missouri



Dear Mr. Rea:

This official opinion is issued in response to the request contained in your letter of recent date. The question is as follows:

" 'Are county clerks, boards of election commissioners or other proper election officials required to designate tax supported public buildings to be used as polling places under the provisions of Section 111.257, RSMo. Supp. 1967?' "

The wording of the Statute above referred to pertinent to the issue before us is as follows:

"The county clerk, board of election commissioners, or other proper election official having authority over any general, special or local election, may designate tax-supported public buildings to be used as polling places, and no official having charge or control of any public building shall refuse to permit the use of the building for election purposes."

To determine whether or not the above statute is permissive, in that it is purely optional with the proper official as to whether or not to designate a public building as a polling place, or if by the statute it is mandatory that he do so hinges upon the interpretation given the word "may."

Webster's Third New International Dictionary defines "may" as "have permission to ... used nearly interchangeably with can."

Honorable Peter H. Rea

In 82 C.J.S. Statutes §830a, page 877 it states: "As a general rule the word 'may,' when used in a statute, is permissive only, and operates to confer discretion, especially where the word 'shall' appears in close juxtaposition in other parts of the same statute."

A reading of §111.257 RSMo, Supp. 1967, shows that the person having charge of the building has no discretion in the matter. Had the legislature meant to negate discretion on the part of the official designating the polling places, the word "shall" would have been used to clearly indicate the mandatory intent of the statute.

The courts of Missouri have almost invariably given the word "may" a meaning allowing discretion - granting an option, or giving permission. State v. Youngdahl, 391 S.W.2d 605, 607, 608, (K.C.C.A. 1965); Byers Bros. Real Estate & Insurance Agency, Inc. v. Campbell 353 S.W.2d 102, 108 (K.C.C.A. 1961); State v. Dinwiddie, 213 S.W.2d 127, 130, (Mo. 1948).

Common knowledge in addition to the wording of the statute would clearly indicate the discretionary tone of the statute. For example a great many precincts, or even wards or other geographic voting units would not contain a tax supported public building or if it did contain one, it could be highly unsuitable for a polling place e.g. a city dog pound.

Conclusion

Therefore it is the opinion of this office that county clerks, boards of election commissioners or other proper election officials are not required to designate tax supported public buildings to be used as polling places under the provisions of Section 111. 257 RSMo, Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jack Edwards.

Very truly yours,



JOHN C. DANFORTH
Attorney General

STATE BOARD OF EDUCATION:
FEDERAL-STATE AGREEMENTS:
MANPOWER DEVELOPMENT AND
TRAINING ACT:

Review and certification of Missouri
State Board of Education's Agreement
with the United States Department of
Health, Education and Welfare under
the Manpower Development and Training
Act of 1962, as amended.

April 17, 1969

OPINION LETTER NO. 222

Mr. B. W. Robinson
Assistant Commissioner
State Board of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Robinson:

Per your request we have reviewed the Training Program Agreement between the Missouri State Board of Education and the United States Department of Health, Education and Welfare and the United States Commissioner of Education which implements the Manpower Development and Training Act of 1962, as Amended. Our review has taken into consideration the federal statutes, 42 U.S.C. 2571-2628, the federal regulations, 34 Federal Register 1313-1319 (January 28, 1969), Article IX, Section 2, Missouri Constitution, and Sections 161.092(2) and 178.430, RSMo Supp. 1967.

Based on the foregoing we are of the opinion that the State Board of Education is authorized to enter into the above Agreement. Further, we are of the opinion that the State Board of Education is the appropriate state educational agency under Section 231(a) of the Federal Act (42 U.S.C. 2601).

This opinion letter constitutes our official certification of the Agreement. In addition, we have executed the form approval contained in the Agreement. We are returning herewith six copies of the Agreement.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Louis C. DeFco, Jr.
Assistant Attorney General

db

Enclosures 6

DIRECTOR OF REVENUE:

STATE TREASURER:

INTANGIBLE PERSONAL PROPERTY TAX:

INTEREST:

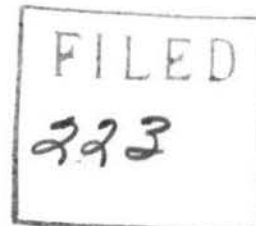
(1) Ninety-eight per cent of the proceeds of intangible personal property tax which are to be returned to the local political subdivisions is not

to be transmitted to the State Treasurer; (2) Treasurer of Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri; (3) Director of Revenue is an insurer of that portion of the intangible personal property tax which he retains and is bound to turn over the proceeds to the proper local official on the date as specified by statute. That in discharging this duty he may deposit the portion of the revenue which ultimately is to be returned to the counties for safe-keeping and that he may, in so doing so, deposit these moneys in "time deposit" accounts which draw interest. In the event that the Director chooses to avail himself of the opportunity to place this money at interest, the interest earned is to be returned to the counties in proportion to the amount of revenue produced by that county.

October 27, 1969

OPINION NO. 223

Honorable Don Owens, Senator
Twentieth District
374 South Bernhardt
Gerald, Missouri 63037



Dear Senator Owens:

This is in reply to your request for an opinion of this office concerning the question whether the State Treasurer may invest funds received from the collection of the intangible tax levy in government securities or other investments for the period between the time such taxes are received by the Department of Revenue and the time such taxes are disbursed to the various political subdivisions, and, if so, whether the income earned can be retained by the State.

In a prior Attorney General opinion, dated April 4, 1947, issued to the Honorable Edde B. Pope, this office held that the Missouri Constitution does not require tax monies from intangibles which are to be returned to local political subdivisions to be deposited in the state treasury (copy enclosed). Thus, the State Treasurer does not receive nor have any function regarding the

Honorable Don Owens

funds to be returned to the local political subdivisions, and therefore, the answer to your question with regard to the moneys to be so returned is in the negative.

Article X, Section 4 (x), Constitution of Missouri, 1945, which authorizes the collection of the intangible tax by the State of Missouri in behalf of the local governments provides that two per cent of the proceeds is to be retained by the State. The statutory provisions which implement this tax also provide that the State is to retain two per cent for collection. See, e.g., Sections 146.110, RSMo 1959 and 148.220, RSMo 1959.

Article IV, Section 15, Missouri Constitution, 1945 (as amended 1956) provides:

" . . . All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and return therefrom shall belong to the state. . . "

In a prior Attorney General opinion, dated January 7, 1966, issued to the Honorable M. E. Morris, Treasurer of the State of Missouri, this office held that the Department of Revenue must promptly transmit all moneys received by it to the State Treasurer. (copy enclosed)

The Treasurer of Missouri is directed to determine which funds are not needed for current operating expenses of the state government and to place that amount at interest for the benefit of the State of Missouri. Article IV, Section 15, Constitution of Missouri, 1945 (as amended, 1956); Section 30.260, RSMo 1959.

Therefore, it is our opinion that the Treasurer of Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri.

Since the Director of Revenue does not transmit ninety-eight per cent of the proceeds of this tax to the Treasurer, may the Director of Revenue place these funds at interest, and if so, who is to benefit by the interest so earned.

Article X, Section 4(c) provides that the proceeds of the tax on intangible personal property are to be:

" . . . returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

The tax on intangible personal property has been implemented by statute. In Chapter 146, every person, as therein defined, is required to file on or before April 15 of each year a property tax return on intangibles. The tax is payable at the time the return is made and becomes delinquent on June 1 of the year it is due. Section 146.050. The proceeds of the tax are distributed by the Director of Revenue pursuant to Section 146.110. That section provides that the Director of Revenue:

" . . . shall annually, on or before the fifteenth day of September, return the amount of intangible taxes collected, less two per cent thereof, which shall be retained by the state for collection, to the county treasury of the county in which the particular taxpayers are domiciled . . ."

Similarly, the intangible personal property tax payable by financial institutions is provided for in Chapter 148. There, the taxpayers shall file a return with the Director on or before the first day of June of each year and the tax imposed by Chapter 148 is due and payable on that date. Sections 148.050 and 148.060. The tax collected shall be returned by the Director, less two per cent for collection, to the county treasurer of the county in which the taxpayer is located on or before December first of each year. Section 148.080.

It is apparent from these sections that the Director of Revenue receives funds several months prior to the date upon which he is obligated to return them to the counties. A review of the statutes governing the duties and obligations of the Director of Revenue does not reveal any section which governs or controls the manner in which he is to handle the funds collected prior to the date upon which the moneys must be turned over to the local government.

The basic duty of the Director of Revenue is to turn over all of the funds which he receives. As to this duty, the Missouri courts have long held that a public official is an insurer of the funds which he receives and is obliged to remit the funds without fail. In City of Fayette v. Silvey, 290 S.W.1019 (K.C.App. 1926) the Court stated:

" . . . The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is

an insurer of public funds lawfully in his possession." loc. cit. 290 S.W. 1019, 1021.

The following cases support this basic principle: City of Fulton v. Home Trust Co., 78 S.W.2d 445 (Mo. 1934); Glaze v. Shumard, 54 S.W.2d 726 (K.C.App. 1932); The State ex rel. Board of Sup'rs. of Harrison County Drainage Dist. Township v. Powell, 67 Mo. 395 (Mo. S.Ct. 1878); The State ex rel. Mississippi County v. Moore, 74 Mo. 413 (Mo. S.Ct. 1881).

In addition to his obligation as an insurer, a public official is restricted in his actions by the statutory duties imposed upon him. In Lamar Tp. v. City of Lamar, 169 S.W. 12, 261 Mo. 171 (1914) the Court stated:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out"
loc. cit. 261 Mo. 171, 189

To determine the scope of the duties of the Director of Revenue in holding the proceeds of the intangible property tax the statutes under which it is collected are to be examined. Lancaster v. County of Atchison, 180 S.W.2d 706 (Mo. S.Ct. en banc, 1944). However, the statutes are silent.

A similar situation was presented in City of Fulton v. Home Trust Co., 78 S.W.2d 445 (Mo. S.Ct. 1934). There, the city collector collected certain funds which he was to turn over to the city treasurer monthly. It was his practice to deposit funds that he received during the month in demand deposits and then to transfer these funds at the end of each month by check to the city treasurer. The bank in which the collector deposited his monthly receipts failed and was placed under the control of the State Commissioner of Finance on December 29, 1931, at which time a substantial balance had been accumulated during the month of

December by the collector. In determining whether the deposit by the collector was proper, the Court stated:

"The sections of our statute relating to the duties of a city collector of cities of the third class and the ordinance of the city of Fulton defining same, above cited and quoted, clearly contemplates that the city collector retains city moneys and revenues, which he collects, in his custody, during the interim between the monthly settlements therein provided for and required. Neither by statute or ordinance is he required, upon making a collection of city taxes or other city revenues, to forthwith pay over or transfer each individual item to the city treasurer and take a receipt therefor, but he is authorized and permitted, if not in fact directed, to retain the various sums so collected during the month until the end of the month at which time he is required to make his monthly settlement and pay over to the city treasurer the total amount of such collections made during the month and take receipts therefor one of which he files with the city clerk. Clearly during such periods he is the lawful custodian of such funds. Neither statute nor ordinance directs how or in what manner he shall hold or preserve the funds while same are in his custody. He is responsible for their safekeeping and under a bond conditioned that he will pay them over to the city treasurer monthly as required by statute and ordinance. The fund in controversy, being the total, as stated, of numerous daily collections made by Brown as city collector during the month, was therefore being lawfully held and retained by him as city collector. . . He was the legal custodian of these funds and certainly was authorized and warranted in depositing them, from time to time during the month, as received, in a bank for safe-keeping, if he chose to do so, and his act in so doing was not in violation or contravention of any statute or ordinance. . . ." loc. cit. 78 S.W.2d 445, 447.

Thus, it is apparent that since the statutes do not control or designate the manner in which the Director of Revenue is to handle these tax moneys, it is lawful for him to deposit them for safe-keeping. In re Hunter's Bank of New Madrid, 30 S.W.2d 782 (Spr.App. 1930); City of Aurora v. Bank of Aurora, 52 S.W.2d 496 (Spr.App. 1932).

Assuming then that the proceeds of the intangible property tax may be deposited by the Director of Revenue, may these funds be deposited in time deposits to draw interest; and if so, who is to receive the benefit of this interest.

Section 558.220, RSMo 1959, originally enacted in 1853, prohibits public officials from "loaning" money which comes to them in official capacity and reads as follows:

"No officer appointed or elected by virtue of the constitution of this state, or any law thereof, and no officer, agent or servant of any incorporated city or town, or of any municipal township or school or road district, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service, or under color or pretense thereof; . . ."

In The State v. Rubey, 77 Mo. 610 (Mo. S.Ct. 1883), the State sought to recover from the assignee of a defaulting bank moneys which the treasurer of Macon County had deposited prior to the bank failure. The State contended that under the predecessor statute to Section 558.220 the treasurer had no right to make a general deposit of the county revenues because such a deposit "amounted to a loan of the money to the bank". In disposing of this contention, the Court noted:

". . . It is doubtless true that every general deposit is so far, in effect, a loan as to create the relation of debtor and creditor between the bank and the officer; (citation omitted) but, we are not, therefore, inclined to hold that general deposits in bank by county and State officials, other than the State Treasurer, whose duties in this regard are prescribed by the constitution are within the inhibition of section 1327, supra. [Section 558.220, RSMo 1959] . . ." loc. cit. 77 Mo. 610, 620

The Court construed this and related statutes and found a legislative intention to discriminate between a deposit in a bank for safety and convenience and an ordinary loan. The Court concluded that the conduct prohibited is:

" . . . not the making of a deposit simply,
but the making of a deposit with a view
to profit on the part of the officer . . ."
loc. cit. 77 Mo. 610, 621

The purpose of this section and related sections is to compel the officer to look to the security of the funds in selecting a depository and "not to his own emolument". Although Section 558.220, RSMo 1959, was not discussed, the holdings in City of Fulton v. Home Trust Co., supra; In re Hunter's Bank of New Madrid, supra, and City of Aurora v. Bank of Aurora, supra, recognize that the deposit of funds in a demand deposit are not precluded by Section 558.220, RSMo 1959.

Unless there is a specific agreement to the contrary, a deposit in a bank is presumed to be a general deposit establishing a relationship of debtor-creditor. Security Nat. Bank Savings & Trust Co. v. Moberly, 101 S.W.2d 33 (Mo. S.Ct. 1936); Cassell v. Mercantile Trust Company, 393 S.W.2d 433 (Mo. S.Ct. 1965); First National Bank of Clinton v. Julian, 383 F.2d 329 (C.A. 8, 1967), applying Missouri law.

These authorities indicate further that a debtor-creditor relationship is avoided only when a "special deposit" is made and the depositor and the bank agree that the asset deposited may not be used by the bank, but must be kept intact to be returned to the depositor.

Since the enactment of the predecessor to Section 558.220, extensive regulations have been enacted governing the banking industry. This office has previously held in Opinion No. 177, dated December 20, 1963, issued to Robert B. Mackey, a copy of which is attached, that county courts in making deposits of county funds are not limited to demand deposits, but may place a portion of the funds in interest-bearing time deposits. Although this opinion was based upon Chapter 110 -- Depositories for Public Funds, certain conclusions reached there are relevant. The writer determined on the basis of Section 362.010, RSMo Supp. 1967, of the banking statute that the sole distinction between "demand deposits" and "time deposits" is that the payment of demand deposits can be legally required within thirty days, whereas time deposits cannot be required within such period. The distinction between "demand deposits" and "time deposits" is of importance since under federal regulation and Section 362.385, RSMo Supp. 1967, it is unlawful for banks to pay interest upon demand deposits.

For the Director to obtain interest upon his deposits, therefore, the deposit must be made in time deposit accounts. In the case of either demand deposits or time deposits, a debtor-creditor relationship is established. Of course, the Director may not preclude himself by contract from the ability to perform his statutory duty of turning over the funds. It would not be proper to enter into a contract which would in any way limit his ability to turn over the funds on the date prescribed by statute. He must be prepared at the appointed time to turn over the funds in his hands. Where this duty can be fulfilled and, at the same time, interest can be obtained, it is the opinion of this office that the authority which allows the deposit of funds in demand deposits provides equal authority to deposit funds in time deposits so that interest may be earned.

In certain circumstances, the legislature has specified the account to which interest is to be credited. For example, Section 30.240 provides that all interest derived from the deposit or investment of "state moneys" shall be credited by the State Treasurer to the general revenue account. As has been previously noted, the proceeds of the intangible personal property tax that are to be returned to the county are not state funds. This office has previously held in Opinion No. 84, dated May 24, 1965, addressed to Mr. Lee C. Fine, a copy of which is attached, that interest earned, the allocation of which is not governed by statute, is viewed as an accretion to the fund which produces it. Based upon the authority cited therein, it is therefore our opinion that the interest earned from the deposit of the proceeds of the intangible personal property tax which are to be returned to the counties should be allocated to the counties in proportion to the amount of revenue produced by that county.

CONCLUSION

It is the opinion of this office that:

(1) Ninety-eight per cent of the proceeds of the intangible personal property tax which are to be returned to the local political subdivisions is not to be transmitted to the State Treasurer;

(2) The Treasurer of Missouri is to receive promptly two per cent of the proceeds from the intangible personal property tax and, if he determines that any portion of this two per cent is not needed for current operating expenses, that amount is to be placed at interest for the benefit of the State of Missouri;

(3) The Director of Revenue is an insurer of that portion of the intangible personal property tax which he retains and is bound to turn over the proceeds to the proper local official on the date as specified by statute. That in discharging this duty he may

Honorable Don Owens

deposit the portion of the revenue which ultimately is to be returned to the counties for safe-keeping and that he may, in doing so, deposit these moneys in "time deposit" accounts which draw interest. In the event that the Director chooses to avail himself of the opportunity to place this money at interest, the interest earned is to be returned to the counties in proportion to the amount of revenue produced in that county.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, John C. Craft.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 71, Pope, 4/4/47
Opinion No. 28, Morris, 1/7/66
Opinion No. 177, Mackey, 12/20/63
Opinion No. 84, Fine, 5/24/65



June 6, 1969

Opinion Letter No. 224

Honorable L.M. Garner, M.D., M.P.H.
Acting Director
Missouri Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Dr. Garner:

This letter is in response to an opinion request from you in which you inquire as to whether or not the Missouri Division of Health has the authority to promulgate regulations with respect to food products and whether the Division may set such standards if none are prescribed by the federal act.

You enclosed and attached to your opinion request a letter from this office dated February 5, 1958, addressed to the Honorable H.M. Hardwicke, who was the former acting director of the Division of Health. That letter was not an official opinion, and the reasoning upon which the conclusion was based is not clear. The answer in that letter however was negative; and after a thorough examination of the sections involved, we believe that the reasoning and the conclusion reached were clearly in error.

That is, under Section 196.045, RSMo 1959, the Division of Health has authority to promulgate regulations for the enforcement of Sections 196.010 to 196.120, and such regulations must conform insofar as practicable with those promulgated under the federal act. In Section 196.050, RSMo 1959, the Division is prohibited from promulgating any regulation or establishing any definitions or standards which are more rigid or more stringent than those prescribed by the federal act applying to any commodity covered by Sections 196.010 to 196.120; and if any commodity or product covered by said sections complies with the definitions and standards prescribed by the federal act, it shall be deemed to comply with these sections.

Honorable L. M. Garner

It is clear from the above sections and other references to regulations and standards contained within Sections 196.010 to Section 196.120 that the Division of Health does have the authority to promulgate regulations and standards within the limits stated for the proper enforcement of these sections.

Further, we are of the opinion that the legislature empowered the Division of Health with authority to promulgate regulations and to set standards with respect to commodities not covered by federal law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CITIES:
FIRST CLASS CITIES:
INCORPORATION:
ADOPTION OF CHARTER:
CONSTITUTIONAL CHARTER CITIES:

An unincorporated area incorporating as a first class city cannot at the same time adopt a charter form of government, but may hold elections to present the question of adoption of a charter only after organizing as a first class city.

May 13, 1969

OPINION NO. 225

Honorable Herman P. Winkelmann
State Representative - 48th District
Room 403, State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Winkelmann:

This is in answer to your request for an official opinion of this office concerning the question whether an area incorporating as a first class city may, at the same time, incorporate with a charter form of government.

A city of the first class contains more than sixty-five thousand inhabitants. Section 72.010, RSMo 1959. Cities of the first class are organized under Chapter 73, RSMo, "... in the manner provided by law . . .", Section 73.010, RSMo 1959. A procedure for this incorporation is found in Section 72.080, RSMo 1959, relating to cities of all classes, and provides for presentation of a petition by a majority of an unincorporated city's inhabitants to the county court of the county where the "city" is situated. An alternative procedure is provided in Section 72.085, RSMo Supp. 1967, for unincorporated areas in second class counties and first class counties with a charter form of government.

Any city having more than ten thousand inhabitants may frame and adopt a charter form of government in the manner provided in Section 19 of Article VI, Constitution of Missouri, and Chapter 82, RSMo. Section 19 of Article VI of the Missouri Constitution provides in part as follows:

"Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state, in the following manner: The

Honorable Herman P. Winkelmann

legislative body of the city may, by ordinance, submit to the voters the question: 'Shall a commission be chosen to frame a charter?' . . . The question shall also be submitted on a petition signed by ten per cent of the qualified electors of the city, filed with the body or official in charge of city elections."

* * * *

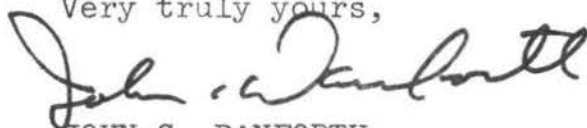
In Opinion No. 34, Hollingsworth, May 21, 1964 (copy enclosed), we held that an unincorporated area may not initially incorporate as a third class city having a City Manager form of government. It is our view that the same is required of areas incorporating initially as a first class city, due to the requirement of the Constitution that the "legislative body of the city" or "ten per cent of the qualified electors of the city" must begin action toward a city charter (emphasis added). A "city" with a "legislative body" and a "body or official in charge of city elections" must already exist before a charter election can be initiated. Therefore, initial incorporation as a city is a prerequisite to holding elections to adopt a charter form of government.

CONCLUSION

It is the opinion of this office that an unincorporated area incorporating as a first class city cannot at the same time adopt a charter form of government, but may hold elections to present the question of adoption of a charter form of government only after first organizing as a first class city.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,



JOHN C. DANFORTH
Attorney General

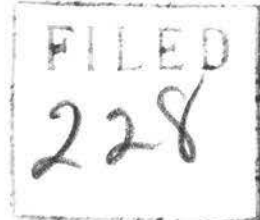
CAPITOL BUILDING:

Custodian of House has control only over offices of members and of rooms on the third and fourth floors of West side of the Capitol.

June 12, 1969

OPINION NO. 228

Honorable Richard M. Marshall
Representative
Room #235B
43rd District
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Marshall:

This official opinion is issued in response to your request dated April 16, 1969, wherein you ask whether all rooms on the West, or "House" side of the Capitol Building are under the control of the Custodian of the House of Representatives, or whether only the rooms on the Third and Fourth floors on that side are under his control.

Section 23.110 RSMo 1959, provides as follows:

"The offices of the members of the house of representatives and the other offices on the third and fourth floors of the state capitol building designed for the use of the members and officers of the house of representatives, including the house chamber, the house lounge, bill rooms and file rooms and the furniture, files and supplies therein, are reserved for the permanent use of the members of the house of representatives. These rooms, together with all other rooms on the house side of the capitol building, are in direct charge and under the control of the custodian of the house of representatives, who is considered the representative and employee of the committee on legislative research. No use of any of said quarters shall be made except with the consent and upon order of the committee on legislative research."

Section 23.100, RSMo 1959, gives virtually identical authority to the custodian of the Senate with respect to rooms on the other side of the capitol.

Section 8.110, RSMo 1959, states:

"Except as otherwise provided by law, the director of public buildings has charge and control of the capitol."

Control of offices on the third and fourth floors of the House side of the State Capitol Building was given to the custodian of the House of Representatives in 1939. Laws 1939, p. 503. In 1943 such section was amended by changing the reference in the law from "Committee on Legisla-

Honorable Richard M. Marshall

tive Quarters and Research" to "Committee on Legislative Research."
Section 8.110 dates back to 1840, with various revisions. (L. 1840, p. 120)

The Capitol Building for many years has housed agencies of the executive branch of the government, as well as providing for the legislative branch. We are advised that in 1939 and in 1943 agencies of the executive branch occupied space on the first and second floors on the West side of the Capitol. This circumstance is of assistance in construing Section 23.110. It would be unusual to give the custodian of the House authority over office space such as that occupied by the Secretary of State or other executive officers. If such were the intent, it is likely that the statute would say so expressly.

We find no mention of the "House Side" of the Capitol except in Section 23.110. The term, therefore, must be construed with reference to the situation which existed when the statute containing it was enacted, and, by this construction, the house side of the Capitol would consist of the Third and Fourth floors on the West side of the building.

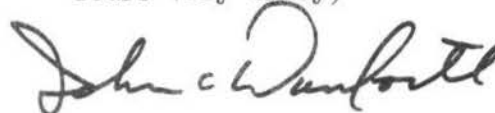
All parts of a statute are presumably included for some purpose, and the statute must be construed, if possible, so that no word, phrase or sentence will be without meaning. The first sentence of 23.110 applies to two sets of "offices," (i) those of the members of the House of Representatives, and (ii) offices designed for the use of members and officers of the House of Representatives. Some of the latter are more particularly described. The second sentence of the section refers to "all other rooms on the House side of the Capitol." This latter sentence will have meaning, according to our construction, if there are "rooms" on the Third and Fourth floors on the West side which are not "offices." There are, at the very least, rest rooms, coffee rooms, closets, and perhaps other rooms, and these would be covered by the second sentence of Section 23.110.

CONCLUSION

It is the opinion of this office that the Custodian of the House of Representatives has the charge and control of the offices of members of the House of Representatives, and of all other offices and rooms on the Third and Fourth floors of the West side of the Capitol Building, but that his authority does not extend to rooms on the other floors of the West side of the Capitol.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Yours very truly,

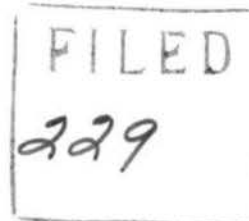


JOHN C. DANFORTH
Attorney General

November 6, 1969

OPINION LETTER NO. 229
(Answered by letter-Nowotny)

Honorable John A. Grellner
Representative, 40th District
7380 Dale
Richmond Heights, Missouri 63117



Dear Representative Grellner:

This is in reply to your request for an opinion of this office concerning the question whether the General Assembly can authorize the use of a "certain portion of non-motor vehicle tax funds for acquisition, construction, repair and maintenance of boating and recreational facilities." By "non-motor vehicle tax funds" we understand you to mean those funds collected from sales of gasoline as provided in Section 30(a), Article IV of the Missouri Constitution, that will not be used to propel vehicles on the state roads and streets. In your letter you refer to Section 142.230, RSMo Supp. 1967, which deals with refunds of such non-motor vehicle tax funds.

A tax on motor vehicle fuel is provided for by Article IV, Section 30(a), Missouri Constitution, reading in part as follows:

"1. On and after the first day of the month next following the adoption of this section, a tax upon or measured by fuel used for propelling highway motor vehicles shall be levied and collected as provided by law. Any amount of the tax collected with respect to fuel not used for propelling highway motor vehicles shall be refunded by the state in the manner provided by law. The remaining net proceeds of the tax, after deducting costs of collection, apportionment and making refunds shall be apportioned between the counties, cities and the state as hereinafter provided and shall stand appropriated without legislative action for the following purposes:

* * * *

Honorable John A. Grellner

"3. * * * All funds collected shall be used solely for construction, reconstruction, maintenance, repair, policing, signing, lighting, and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes."

Section 30(b), Article IV, Missouri Constitution, provides:

"Source and application of state highway funds.-- For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes), less the cost (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, and less refunds and that portion of the fuel tax revenue to be allocated to counties and to cities, towns and villages under section 30(a) of Article IV of this Constitution, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

"First, to the payment of the principal and interest on any outstanding state road bonds.

"Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

"(1) To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;

Honorable John A. Grellner

"(2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the state as permanent parts of the system of state highways, to the extent of the value to the state of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

"(3) In the discretion of the commission to locate, relocate, establish, acquire, construct and maintain the following:

"(a) supplementary state highways and bridges in each county of the state as hereinafter provided;

"(b) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established, and connect the same with the state highways; and also national, state or local parkways, travelways, tourways, with coordinated facilities;

"(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

"(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;

"(e) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and

"(f) additional state highways, bridges and tunnels, outside the corporate limits of cities having a population in excess of one hundred fifty thousand, either in the congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic.

"(4) To acquire materials, equipment and buildings necessary for the purposes herein described;

Honorable John A. Grellner

and

"(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

The rule of construction to be followed here is that words used in the constitution are presumed to have been employed in their natural and ordinary meaning and no forced or unnatural construction is to be placed upon them. State ex rel. Randolph County v. Walden, 357 Mo. 167, 206 S.W.2d 979.

Any limitation in the constitution on the use of funds by the State Highway Commission is binding on the legislature and such limitation is mandatory. State ex rel. v. Hitchcock, 241 Mo.433, 146 S.W.40.

Thus, it is clear that any tax moneys collected pursuant to these constitutional provisions on fuel used for propelling highway motor vehicles must be used solely for roads and streets in Missouri and the General Assembly cannot authorize the use of any such funds for the acquisition, construction, repair and maintenance of boating and recreational facilities.

However, in the administration of this law some of the money collected is from fuel that is actually used for other purposes. Article IV, Section 30(a), Missouri Constitution, directs that this money be refunded.

" * * * Any amount of the tax collected with respect to fuel not used for propelling highway motor vehicles shall be refunded by the state in the manner provided by law. * * * "
(Emphasis added)

The manner provided by law for refunding such money is Section 142.230, RSMo Supp. 1967. Subsection 1 creates a presumption of highway use and reads as follows:

"1. All motor fuels distributed or sold in this state by any person shall be presumed to have been sold for use in propelling motor vehicles upon the public highways of this state."

Thus, in the manner presently provided by law a person who pays the motor fuel tax on fuel not used in propelling motor vehicles on the highways must make proper and timely claim for refund or else the tax money goes for the use of the highways.

The question is whether this money which may be designated as

Honorable John A. Grellner

tax on fuel which the purchaser declares at the time of purchase is not to be used on the highways, Section 142.230.5, supra, but is subsequently not applied for as a refund, may, instead of being used for the highways under the presumption section, be used for boating and recreational facilities.

It is our opinion that any tax moneys collected pursuant to Article IV, Section 30(a) and Chapter 142 is either money that must be used for the highways or money that must be refunded. Therefore, no such money collected under these provisions of law for purposes of the highways can be used for any other purpose, such as boating and recreational facilities.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

September 25, 1969

OPINION LETTER NO. 232

Honorable William R. Royster
State Representative, District 8
1021 Scarritt Building, 818 Grand
Kansas City, Missouri 64106

Dear Representative Royster:

You have asked for my opinion concerning three situations involving the handling of public funds in Jackson County.

The first situation, described in an attached KNBC-TV News Probe, was the transfer of County Road and Bridge Funds to the Little Blue Valley Sewer District. We have previously forwarded to you Attorney General's Opinion No. 193 of June 12, 1969, to Representative William Moore which states my views on this matter.

Your second situation, also described in an accompanying KNBC-TV News Probe, concerns the failure of the county clerk to deposit collected license fees into the county treasury twice yearly since January 1, 1968, with a consequent loss of interest that might otherwise have been earned on these moneys. The News Probe states that these fees were collected in return for liquor, amusement, park, boat, motor and auctioneer licenses and that Missouri law requires the county clerk to pay these fees into the county treasury on the first of January and the first of July of each year.

We find no violation of state law in these stated facts for there is no requirement of a semi-annual turnover of license fees by the county clerk to the county treasurer. The general requirement in handling such fees is as follows:

"2. [In all counties of class one not having a charter form of government the] . . . clerk of the county court is hereby required to prepare and issue all county licenses established by

Honorable William R. Royster

law, and collect the county fees therefor and remit the same to the county treasury." (Section 51.280, RSMo Supp. 1967).

Another statute refines this general requirement to some extent:

"All county officers, excepting public administrators and notaries public, in all counties of class one shall be compensated for their services by salaries only. It shall be the duty of any such county officer in any such county to charge on behalf of the county every fee that accrues in or to his office and to receive the same and all fees, fines, costs, commissions, penalties and charges that may be taxed in his office. All such fees, fines, costs, commissions, penalties and charges imposed by law and collected by such officer shall be paid into the county treasury and become the property of the county. The county court of such counties shall determine by a proper order when such fees, fines, costs, commissions, penalties or charges so collected by any of the officers of said county shall be paid and turned over to the county treasury and how they shall be accounted for. . . ." (emphasis added) (Section 50.340, RSMo 1959)

These statutes set forth no particular time limit on depositing county license fees in the county treasury. There is only a requirement that the deposit be made when the county court so orders. If the clerk fails to deposit fees in his possession when ordered to do so by the county court, he would be in violation of Section 50.340, RSMo 1959, and subject to the penalties prescribed by Section 50.380, RSMo 1959.

The author of the News Probe may be in some confusion as to the application of Section 50.480, RSMo 1959, which in part provides:

"It shall be the duty of each sheriff, marshal, coroner, clerk of the courts of record, and other officers, on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, . . ." (Section 50.480, RSMo 1959)

Honorable William R. Royster

This section is a part of a law (Section 50.470-50.520, RSMo 1959) enacted in 1874 (Laws 1874, p. 66) relating only to court fees and not license fees.

The third situation you describe is the Jackson County Collector's delay in "sending out the tax bills as required by law," and his failure upon finally sending out the tax bills "to include the specifically required interest and penalty." We are unaware of any statutory duty for collectors of first class counties to send out tax statements to individual resident* taxpayers (as is the duty of second, third, and fourth class county collectors by virtue of Section 52.230, RSMo 1959). The collectors of all counties are required by Section 139.010, RSMo 1959, immediately after receipt of the tax books (on or before October 31 of each year; Sections 137.290 and 137.392, RSMo 1959) to give no less than twenty days notice of the time and place at which they will meet the taxpayers to collect and receive taxes. However, the notice required by Section 139.010, RSMo 1959, is by posting four handbills in each municipal township and by publication for two weeks in a newspaper of the county.

Unpaid real and tangible personal property taxes are delinquent on the first day of January (Sections 140.010 and 140.730, RSMo 1959) and statutory penalties accrue at that time (Sections 140.100 and 140.740). It is the duty of the county collector to collect all delinquent tax penalties and upon his failure to do so he is liable for interest thereon and a penalty of ten percent of the uncollected penalties (Section 139.100, RSMo 1959). Enforcement of the collector's liability may be by a suit on his bond, which is conditioned that he "... faithfully and punctually collect . . . all state, county and other revenue . . . and . . . in all things faithfully perform all the duties of the office of collector . . ." (Section 52.020, RSMo 1959).

Yours very truly,

JOHN C. DANFORTH
Attorney General

*Nonresident taxpayers, upon written application, are entitled to receive from the collector a statement of the amount of taxes due on their land. Section 139.060, RSMo 1959.



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

April 18, 1969

OPINION LETTER NO. 234

County Court

Dear Sirs:

It has been called to our attention that there has been in many counties a failure by some county officials to furnish under oath the information required by Section 51.150(5) RSMo, Supp. 1967. Such section provides as follows:

"* * *1. It shall be the duty of the clerk of the county court:

(5) To compile and keep a list of all salaries and non-accountable fees received by each elected county official by virtue of his office for each calendar year. The source of each fee shall be itemized, the amount of mileage allowance received shall be reported, and the total fees less expenses shall be shown. Each elected official shall certify and give all of the aforesaid information under oath by affidavit on his office to the clerk of the county court on or before February fifteenth of each year for the preceding calendar year and any official who fails to do so shall not receive any remuneration for his services until he complies with this provision; the county court shall not order and the county clerk shall not issue a warrant for disbursement of any money to any elected county official who has not filed his report as provided in this section; * * *"

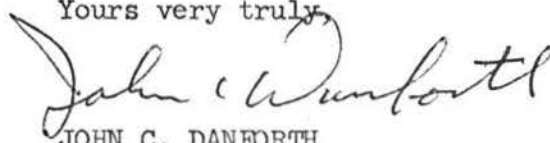
We call your attention to the fact that such section provides in crystal clear language that the county court shall not order the issuance of a warrant for disbursement of money to any elected county official who has not filed the required report before the statutory deadline.

Your attention is invited to the case of State to use of Consolidated School District No. 42 of Scott County v. Powell et al. 221 SW 2d 508, 359 Mo. 321. In that case the Supreme Court of Missouri affirmed a personal money judgment in the amount of \$9531.25 against the school district directors who transferred money from the teachers' fund to the incidental fund because such transfer was considered by the directors necessary to the operation of the district. The court stated the facts as follows: 1c. 509

"* * * The evidence shows that, between July 1, 1944 and June 30, 1946, with the knowledge, acquiescence and consent of each and everyone of the defendants, some \$8500 of funds of the said district, belonging to the Teachers' Fund, were transferred by order of the board to the Incidental Fund of said district and expended as such contrary to the provision of Sec. 10366, R.S. 1939, as amended, Laws 1943, p. 893, Sec. 1, Mo. R.S.A. § 10366. There was further testimony that the said school district was short of incidental funds and that the transfer was considered necessary to the operation of the schools of the district. * * *"

Such case makes clear that public officers who authorize expenditures of public funds contrary to law are personally liable for such wrongful expenditures.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General



May 21, 1969

OPINION LETTER NO. 239

Honorable Thomas D. Graham
State Representative
312 East Capitol Avenue
Jefferson City, Missouri 65101

Dear Mr. Graham:

This is in response to your request for an opinion from this office regarding the following inquiry concerning Jefferson City, Missouri.

On the upcoming City Charter Election, a voter has the right to vote for thirteen Commissioners. What happens to the ballot if the voter votes for more than thirteen?

Section 111.625 RSMo 1959 provides:

The provisions of Sections 111.390 to 111.620 apply to all election precincts in this state but do not apply to township or village elections, to school elections, to any city election in any city of the fourth class or to any election in any city of less than three thousand inhabitants existing under any special law.

Jefferson City is a third class city and thus the provisions of Section 111.580 RSMo 1959 are applicable to its elections. That statute provides in Section 4:

A ballot placed in the ballot box without any marks shall not be counted. Ballots shall be counted only for the person for whom the marks thereon are applicable: when a voter shall place a mark against two or more names for the same office, and only one candidate is to be chosen for the office, none of the candidates shall be deemed to have been voted for and the ballots shall not be counted for either such candidate. (Emphasis supplied)

It is apparent that this statutory provision merely states what must result in a situation presented by your inquiry if the basic secrecy of

Honorable Thomas D. Graham

the ballot is to be preserved in accordance with the Constitutional mandate, Mo. Const. Art. VIII, Sec. 3.

In *Rieffe v. Kamp*, 247 SW 2d 333, 336 (Mo. St. L. Ct. App. 1952) the St. Louis Court of Appeals considered ballots where two candidates were to be voted for in a municipal election for councilman, and three names had been marked on each of the ballots. The court held that none of the three had been properly voted for, citing RSMo 111.580 supra, and held these ballots were "clearly void as they pertain to this office" and "should be rejected."

Therefore, in view of the absence of other provisions to the contrary specifically regarding Charter Elections, and the clear statutory provisions regarding elections generally, it is the opinion of this office that if a voter marks more than thirteen names for Commissioner in a city charter election, as to the office of Commissioner the ballot is void and no such ballot shall be counted for any of the candidates for that office.

Yours very truly,

JOHN C. DANFORTH
Attorney General

August 13, 1969

OPINION LETTER No. 240

Honorable William R. Royster
Representative - 8th District
1021 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106

Dear Representative Royster:

This letter is in response to your opinion requests, both received under separate cover but both concerning the same subject matter.

The first request questions whether the City Council of the City of Grandview, Missouri, has the power by ordinance to judicially determine who may swear in an elected official and whether such an ordinance is valid.

This question is answered by the provisions of the statute with respect to the persons having the authority to administer oaths. That is, Section 79.260, RSMo 1959, with respect to officers of fourth class cities states that such officers before entering upon the duties of the office shall take and subscribe to an oath or affirmation before some court of record in the county or the city clerk. The answer to your first question is therefore clearly that the statutory provisions govern and an ordinance which purports to determine who has the authority to swear in such officers is not valid.

The second question is whether the City Council of the City of Grandview, Missouri, has the power by enactment of an ordinance to judicially determine whether or not an individual could take office after having been elected city marshal and certified the winner by the election board.

Honorable William R. Royster

It is our understanding that the Board of Aldermen of the City of Grandview, Missouri, by ordinance purported to determine that the person elected marshal was not duly qualified and that he should not be issued a certificate of election or allowed to take office.

The City of Grandview has a population in excess of ten thousand persons, is located in Jackson County, and is within the provisions of Section 113.530, RSMo 1959, which provides:

"In all cities or towns in such county, having a population of not less than ten thousand nor more than one hundred thousand inhabitants, in all municipal elections the provisions of sections 113.490 to 113.870 shall apply."

Accordingly, the provisions of Chapter 113.490, RSMo 1959, et seq., relating to Jackson County elections (outside of Kansas City) apply to the conduct of this municipal election.

Section 113.560, RSMo 1959, provides in full as follows:

"Power of board to conduct elections, certify returns--rules and regulations. --The board shall have full and complete power to conduct any and all elections in the county and to receive and certify the returns thereon. The board shall certify the returns to the proper officer upon whom falls the duty of issuing certificates of election. The board shall make any necessary rules and regulations for the conducting of the business of the board and for the expeditious and efficient handling of the business of the board and of the board or registry thereof."

The proper officer in this instance to whom the returns are certified by the election board is the city clerk. Section 79.030, RSMo 1959. The general provisions of Section 79.030 which are in conflict with the special provisions contained in Sections 113.490, et seq., do not apply. Therefore, the Board of Aldermen is not charged with making the returns of such elections or prescribing the manner of making of such returns by ordinance. We note with interest that in State ex rel vs. Newman, 3 S.W. 849, 91 Mo. 445, a mandamus proceeding, the aldermen of the city, whose duty it was to canvass the election returns to determine who had been chosen

Honorable William R. Royster

to the various offices and to direct the clerk to issue certificates of election to the persons elected, declined to direct the clerk to issue the certificate of election to the person elected mayor basing their refusal upon the fact that the relator was not an inhabitant of the city as required by law. The court held that the election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office and stated:

"As, by reason of his qualifications, the relator was not entitled to hold the office, surely he has no right at the hand of the court to be armed with a certificate of election--evidence of title to that which he has no right."

The court in that instance accordingly refused to issue a writ of mandamus; and although the court did not specifically pass upon the question concerning the Board's authority to make such a determination, it is clear from the holding that the court was not inclined to allow a person to take title who clearly had no right to the office. In another instance, in State ex inf vs. Moss, 172 S.W. 1180, 187 Mo.App. 151, the Kansas City Court of Appeals considering the refusal of the Board of Aldermen of a city of the fourth class to meet in an extra session and canvass returns of an election and to certify the result, concluded that such duties are purely ministerial. There is some additional comment by the court at l.c. 1181, which by dictum indicates that possibly qualifications may be inquired into in a mandamus proceeding to compel the performance of a ministerial duty.

Notably, also in State ex rel vs. Williams, 12 S.W. 905, 99 Mo. 291, the Supreme Court of Missouri in a mandamus action involving the eligibility of a person for the office of marshal of the City of St. Louis denied the writ for the reason that the court found that the relator did not possess the requisite qualifications and further, at l.c. 911, indicated that the result would be the same even if doubt existed concerning relators eligibility.

Further, in State ex rel vs. Roach, 150 S.W. 1073, 246 Mo. 56, the court at l.c. 1077, citing with approval State ex rel vs. Shannon, 33 S.W. 1137, 133 Mo. 139, stated:

"The court also quotes with approval the following from the case of People ex rel vs. Canal Appraisers, 73 N.Y. 443: 'When the act, the doing of which is sought to be

Honorable William R. Royster

compelled by mandamus, is the final thing, and, if done, gives to the relator all that he seeks proximately or ultimately, then the question whether he is entitled to have that act done may be inquired into by the officer or person to whom the mandamus is sought, and is also to be considered by the tribunal which is moved to grant the mandamus; but where the act to be done is but a step towards the final result, and is but the means of setting in motion a tribunal which is to decide upon the right to the final relief claimed, then the inferior officer or tribunal may not inquire whether there exists the right to that final relief, and can only ask whether the relator shows a right to have the act done which is sought from him or it.' "

We conclude that the question of eligibility is a matter for determination by a court of proper jurisdiction and that the Board of Aldermen does not have the authority to make a judicial determination of a person's qualifications for such office.

Very truly yours,

JOHN C. DANFORTH
Attorney General

PUBLIC RECORDS:
DEPARTMENT OF REVENUE:
LICENSES:

The records concerning motor vehicle registration are public records under Section 301.350, RSMo 1959 and Section 109.180, RSMo Supp. 1967, and shall be kept open to public inspection during reasonable business hours.

OPINION NO. 241

May 27, 1969



Honorable Phil Snowden
State Representative
District 86
Capitol Building
Jefferson City, Missouri 65101

Dear Representative Snowden:

This is in answer to your request for an official opinion of this office on the following question:

Whether or not the Department of Revenue [sic] has the right or the authority to allow the public to examine vehicle license records or to disseminate this information to the general public; and"

Section 301.350, RSMo 1959, requires the Director of Revenue to keep certain records concerning motor vehicle registration. Sub-section 4 provides:

"All of such books and records shall be kept open to public inspection during reasonable business hours."

Therefore, pursuant to this section the Director has the authority to allow the public to examine motor vehicle records. These records are also made public by Section 109.180, RSMo Supp. 1967, and if the Director refused inspection to any citizen, he would be guilty of a misdemeanor.

CONCLUSION

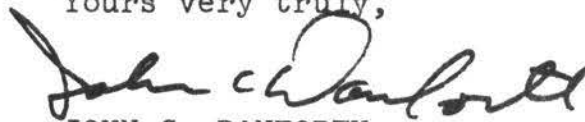
It is the opinion of this office that the records concerning motor vehicle registration are public records under Section 301.350,

Honorable Phil Snowden

RSMo 1959 and Section 109.180, RSMo Supp. 1967, and shall be kept open to public inspection during reasonable business hours.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

POLL BOOKS:
ELECTIONS:
SCHOOLS:

A six-director school district election express statutory language requires that poll books be used and that at the close of each election one of the poll books shall be transmitted to the clerk of the county court and the other retained in the possession of the judges of election open to the inspection of all persons.

OPINION NO. 246

September 25, 1969

Honorable Melvin D. Benitz
Prosecuting Attorney
Callaway County Court House
Fulton, Missouri 65251

Dear Mr. Benitz:

This is in response to your request for an opinion from this office regarding the following inquiry:

"I would appreciate having your opinion as to whether or not poll books are required to be kept and certified and presented to the County Clerk or the Board of Education in a school election."

Your request for opinion indicates that "the Superintendent of Schools of the North Callaway R-1 School District, purportedly relying on a 1943 Attorney General's Opinion, has refused to submit any poll books either to the County Clerk or to the County Superintendent or County Board of Education as to the results of the election held in that district in April of this year. Your requests indicated that he is however, willing to submit 'tally sheets' or at least a copy of said 'tally sheets' kept by the judges in that election."

In view of the fact that the procedures for conduct of elections vary considerably according to the type of school district involved, and in light of the particular situation which gives rise to this inquiry, we limit our opinion to the matter of the use of poll books in a six-director school district.

The prior opinion of the Attorney General to which you refer is No. 69, rendered to Raymond H. Patterson, under date of April 10, 1943. We enclose a copy of such opinion. The

Honorable Melvin D. Benitz

pertinent question involved in that instance dealt with a county superintendent election and was phrased as follows:

"Is it legal in a Co. Supt. election where there was no poll books sent out to the district to list the names in, and the clerks just return ballots for the votes to be checked by? Also tally sheets were sent but no book."

Relying upon the express provisions of Section 10610, RSMo 1939, the Attorney General concluded in response to this request, "It is, therefore, the opinion of this office that poll books are not required to be furnished to school districts for elections of county superintendents of schools, but that tally sheets are provided for use in making returns of the voting in such elections." (Emphasis supplied) Section 10610, RSMo 1939, pertaining to the election of county superintendents, provided in pertinent part:

". . .the clerk of the county court shall mail by registered letter to the president or clerk of the board of school directors of the various districts of the county a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall, so far as practical, conform to the form of poll books set out in section 11490, article 2, chapter 76, R.S. 1939, relating to general elections, and in making the returns of such election, the tally sheets shall be certified by the chairman and the secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present."

Present Section 179.020, RSMo Supp. 1967, prescribes the method for conducting an election of the county superintendent. It, as did its predecessors, provides for the use of tally sheets, which shall conform so far as practicable to the form of poll books, rather than for the use of poll books. In this respect, the statutory procedure for the election of the county superintendent differs considerably from that prescribed for elections generally, *Armantrout v. Bohon*, 162 S.W.2d 867 (Mo. 1942). Insofar then as the election of the county superintendent is concerned, no poll books are required to be used, and the election is to be conducted in accord with the express provisions of Section 179.020.

Honorable Melvin D. Benitz

However, as to six-director school district elections, as distinguished from county superintendent elections, the applicable statutory provisions indicate that poll books shall be used, and that, for the most part, the elections shall be conducted in the same manner as elections for state and county officers. In a six-director school district, such as the North Callaway R-1 District, elections are to be conducted in accordance with the provisions of Section 162.371, RSMo Supp. 1967. Section 162.371 provides in pertinent part:

"2. For each polling place designated by the board under subsection 1, the board shall appoint three judges and two clerks of election. The judges and clerks shall be sworn and the election otherwise conducted in the same manner as elections for state and county officers.

3. All propositions submitted at the annual election may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; . . .

* * *

5. The result of the election at each polling place shall be certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of the board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records." (Emphasis supplied)

Chapter 111 RSMo, containing the general statutory provisions on the conduct of elections, makes numerous references to poll books and the use of poll books. Sections 111.500, 111.510, 111.630, 111.660, 111.670, 111.680, 111.690, and 111.700. Section 111.625 RSMo 1959, states that the provisions of Sections 111.390 to 111.620 do not apply to "school elections." Among the sections dealing with poll books which thus do not apply to school elections by virtue of Section 111.625 are Sections 111.500 (poll books to be furnished) and 111.510 (form of poll book). Section 111.500 makes it the duty of the clerk of the county court for each county to make out and deliver to the sheriff, two poll books for each township, and requires the sheriff of each county to properly deliver them to the respective judges of election. Section 111.510 prescribes the form of the poll book.

Honorable Melvin D. Benitz

The fact that Section 111.500 does not apply to school elections does not lessen the clear statutory requirement of poll books in a six-director school district election, for the particularized election provisions for a six-director district require that "necessary poll books shall be made out and furnished by the secretary of the board." Section 162.371, RSMo Supp. 1967.

Subsection 5 of Section 162.371, does state that the result of the election is to be certified by the judges and clerks to the secretary of the board of education. But the particularized provisions of that section do not indicate what disposition is to be made of the poll books at the close of the election. Thus we are left with such of the provisions of the general election laws regarding poll books as are applicable to a six-director school district election. Section 162.371 (2), RSMo Supp. 1967. Section 111.690, RSMo 1959, of the chapter on conduct of elections expressly treats this matter as to the disposition to be made of the poll books. That section provides in part as follows:

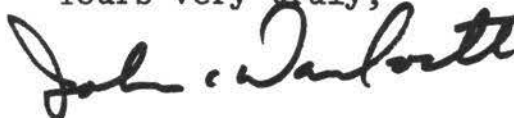
"At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion to the clerk to the county court in the county in which the election was held within two days thereafter; . . . the other poll book shall be retained in the possession of the judges of election open to the inspection of all persons;
. . . "

CONCLUSION

Therefore, it is the opinion of this office that in a six-director school district election express statutory language requires that poll books be used and that at the close of each election one of the poll books shall be transmitted to the clerk of the county court and the other retained in the possession of the judges of election open to the inspection of all persons.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Roger C. Bern.

Yours very truly,



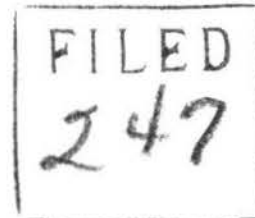
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 69
4-10-43, Patterson

Answer by letter-Wood

5-20-69

OPINION LETTER NO. 247



Mr. Gene Sally
Acting Director
Department of Community
Affairs
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Sally:

This is in response to your letter of April 28, 1969, requesting my opinion as to the ability of your department to legally participate in the Comprehensive Planning Assistance Grant from the United States Department of Housing and Urban Development. The grant will be made pursuant to Section 701 of the Housing Act of 1954, as amended (40 U.S.C.A. Section 461) and it has been designated Program No. Mo. P-146.

You have supplied us with a copy of the application for this grant and a copy of the contract to be executed between the United States Department of Housing and Urban Development and the Missouri Department of Community Affairs.

The Department of Community Affairs by and through the director is vested with the statutory power to:

" . . . accept grants and other financial assistance and may consult, cooperate with, assist, make and enter into contracts with other boards, commissions, agencies and institutions of this state, with local and federal governments, and private organizations, upon such terms as may be mutually agreed upon, . . . " (Section 251.090, RSMo Cum. Supp. 1967)

Mr. Gene Sally

The Department is further empowered:

"To contract for, receive and utilize grants or other financial assistance made available by the state or federal government or from any other source, public or private, for performing the functions of the state office. . . ." (Section 251.190, RSMo Cum. Supp. 1967)

Finally, the Department has been conferred the following specific powers with regard to planning:

"The department of community affairs is hereby designated as the official state planning agency for the purpose of providing planning assistance to counties, municipalities, metropolitan planning areas, and regional planning commissions herein created when requested by such local governmental unit or planning commission to do so, and for such purposes is authorized to:

"(1) Contract with public agencies or private persons or organizations for any purposes of [this law];

* * * *

"(3) Require or receive reimbursement from any political subdivision or subdivisions or regional planning commissions for the actual cost of planning assistance or planning has been requested by said political subdivision or commission except that no reimbursement shall be required or received for such costs to the extent that such costs are covered by federal grants." (Section 251.170, RSMo Cum. Supp. 1967)

The 74th General Assembly of Missouri at its regular session in 1967 appropriated a total of \$187,427.00 to the Department of Community Affairs for the fiscal year ending June 30, 1968. In 1968, the First Extra Session of the 74th General Assembly appropriated a total of \$923,967 to the Department of Community Affairs for the fiscal year July 1, 1968, to June 30, 1969. The 75th General Assembly of Missouri, now in regular session, will conclude its work on June 30, 1969. Until such time, it cannot be stated with certainty the exact amount that will be appropriated to the Department of Community Affairs for the fiscal year beginning July 1, 1969 and ending June 30, 1970. At this stage of the session,

Mr. Gene Sally

however, the House has approved a bill appropriating \$418,894.00 to the Department and this bill is now being considered in the Senate. In light of the prior years' appropriations and the interim status of the fiscal year 1970 appropriation, it appears that the Department of Community Affairs will have available from state funds at least \$201,290.00 to assure the non-federal obligation of funds under the Comprehensive Planning Grant, Mo. P-146. This, of course, does not take into account the possibility of contributions from the various cities of the state who are to receive planning services under the program.

In view of the statutes of Missouri above noted, it is also my opinion that the Comprehensive Planning Assistance Grant Mo. P-146 is a legal undertaking of the Department of Community Affairs and that such is consistent with the laws of Missouri.

I call to your attention Section 33.085, RSMo Cum. Supp. 1967, requiring copies of applications for federal funds, including a description of the project therein contemplated, to be supplied to the Director of the Budget, the legislative Fiscal Officer, the Chairmen of the Missouri House and Senate Appropriations Committees and the Minority Floor Leaders of the Senate and House.

Yours very truly,

JOHN C. DANFORTH
Attorney General

By
Louren R. Wood
Assistant Attorney General

SCHOOLS:
TAXATION (SCHOOLS):

A school district may adopt, by the necessary majority required by the Constitution, a proposal to further increase the rate of taxation for a given year or years beyond the rate previously authorized by popular vote for said year or years. Should a proposal for further increase in the rate

fail to get the necessary majority required, the rate existing at the time of said vote on the proposed further increase is not repealed thereby, but continues in effect for the term previously authorized by vote.

OPINION NO. 249

September 4, 1969

Honorable Stephan Burns
State Representative
42nd District
10702 Manchester
St. Louis, Missouri 63122



Dear Representative Burns:

This is in response to your request for an opinion from this office with regard to the following inquiry:

"Provided a 2/3 vote is obtained and a school tax rate is thereby adopted for four years, cannot a school district by a similar 2/3 vote at any time in that four year period, vote to amend the previous vote in an amount of increase as needed? Would the voters not have the same power as enjoyed by the Assembly; namely that power to amend without repealing the existing law?"

Section 11(b) of Article X of the Constitution of Missouri establishes the maximum annual rates of taxation for school districts which can be levied without voter approval. Section 11(c) of the Constitution provides that under certain specified circumstances the rates of taxation as established in Section 11(b) of Article X of the Constitution may be increased by popular vote. In pertinent part Section 11(c) of Article X of the Constitution provides:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefore; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of 75,000 inhabitants

Honorable Stephan Burns

or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor. . ."

Section 164.021, RSMo Supp. 1967, provides in part as follows:

"1. Whenever it becomes necessary, in the judgment of the school board of any school district in the state, to increase the annual rate of taxation beyond the rate authorized by the constitution for district purposes without voter approval. . . the board shall determine the rate of taxation necessary to be levied in excess of the authorized rate, and the purpose or purposes for which the increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective. The proposal may provide for a greater rate of increase in one or more years than in others and acceptance of a proposal to increase the tax levy for any year or years shall not prevent the board from subsequently proposing a further increase in the tax levy for the same year or years.

4. If the necessary majority of the voters voting thereon, as required by Article X, Section 11, of the constitution, favor the proposed increase, the result of the vote, including the rate of taxation so voted in the district for each purpose, and the number of years the rate is to be effective shall be certified by the clerk of the district to the clerk of the court of the proper county, who, on receipt thereof, shall assess the amount so certified against all taxable property of the school district as provided by law. . . .(Emphasis supplied).

The language of section 164.021, expressly authorizes the board to propose a "further increase in the tax levy" after the levy has already been increased by popular vote beyond the rate authorized by the constitution without a vote. As we understand your question, you ask: If the board chooses to propose a "further increase in the tax levy" for any year or years for which a prior increase has already been voted, and that proposal fails to get the necessary majority of the votes, does the increase previously voted for said year or years remain in effect, or does the unsuccessful attempt to pass a further increase in the levy work as a repeal of the initial increase, thus leaving the school district with only the constitutional maximum authorization for levy? It is the view of this office for reasons stated below that a proposal further to increase the levy for any appropriate year or years is in the nature of an

Honorable Stephan Burns

effort to amend the existing levy which has already received the necessary voter approval, and that a failure to obtain for the proposal the necessary majority as required by the constitution in no way operates as a repeal of the existing law.¹ The result of such failure is simply that the existing levy, previously adopted by popular vote, continues in effect.

The terminology used in section 164.021 certainly indicates that a proposal such as is involved in your question is to be viewed as being in the nature of an amendment to the existing levy, rather than a repeal and an attempt to enact an entirely new levy in lieu thereof. The first sentence of subsection 1 of section 164.021 deals with the initial increase in the levy which can be made with voter approval. Reference to that increase is phrased in terms of "to increase the annual rate of taxation beyond the rate authorized by the constitution" and "the rate of taxation necessary to be levied in excess of the authorized rate." (Emphasis supplied). Conceptually, the initial increase which may be adopted by popular vote is an amount which may be added to the base or foundation which is the constitutionally authorized rate. Contrasted with this is the second sentence of subsection 1 dealing with further increases, the matter under consideration in this opinion. Significantly the reference to this latter increase is not in terms of the constitutionally authorized rate, but rather is in terms of "a further increase in the tax levy" subsequent to an "acceptance of a proposal to increase the tax levy." The apparent thrust of this latter language is that upon the then existing levy structure (composed of the constitutional maximum plus the initial increase by popular vote) may be placed an additional increase if the necessary majority votes for it. Viewed in these terms, mere failure to adopt a proposal which would make the addition to the then existing foundation ought not result in the destruction of a portion of that foundation. Stated another way, the proposed point of departure being the then existing levy structure, failure to get the votes necessary to make the departure means that in terms of the levy, the district is at exactly the same point after the election as it was immediately prior to the election.

Additionally, to take the view that failure to adopt a proposal for further increase would cause the levy to revert to the constitutional maximum, would be to make a real trap of the provisions regarding further increases. An illustration in this regard is appropriate. Assume that a city school district has obtained the necessary majority required by the constitution to increase the levy beyond the constitutional maximum for four years, 1969, 1970, 1971, and 1972, the rates for these respective years being 3.80, 3.80, 3.85 and 3.85. If thereafter, the board of that district decided that for the year 1970 an additional .01 would be required to add a new program of instruction, it would no doubt examine section 164.021, and find that it has authority to go back to the voters to seek approval of this proposed further increase for the year 1970.

The proposal to further increase the 1970 rate by .01 to 3.81 might fail to get the necessary majority (a two-thirds majority in this case). To treat the proposal for a further increase as a repeal and an attempt to enact in lieu of the existing rate, would mean that for at least the year 1970, and for that matter, perhaps for the years 1969-72, the rate would, upon the announcement of the election results revert to the constitutional maximum, 1.25. Surely creating a trap such as

¹The "necessary majority" may be either a simple majority or a two-thirds majority depending upon the rate to be voted upon and the proposed duration of that rate. Op. Atty. Gen. No. 73, Blackwell, 2-15-63. We enclose a copy of such opinion.

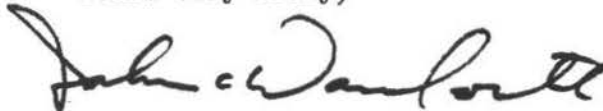
Honorable Stephan Burns

this was not the intent of the legislature in enacting this section. Rather its intent appears to be to grant meaningful flexibility to school districts within the constitutional framework.

CONCLUSION

It is the opinion of this office that a school district may adopt, by the necessary majority required by the Constitution, a proposal to further increase the rate of taxation for a given year or years beyond the rate previously authorized by popular vote for said year or years. It is further the view of this office that should a proposal for further increase in the rate fail to get the necessary majority required, the rate existing at the time of said vote on the proposed further increase is not repealed thereby, but continues in effect for the term previously authorized by popular vote for said year or years.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

Enclosure: No. 73, Blackwell
February 15, 1963

ELECTIONS:
VOTERS:

Section 78.550 only prohibits candidates and other interested persons from hauling voters to the polls.

OPINION NO. 253

September 9, 1969

Honorable William C. Batson, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri 63901



Dear Mr. Batson:

This is in response to your request for an opinion dated May 5, 1969, in which you state:

"Under Section 78.550 of the Missouri Revised Statutes, 1959, I would like an opinion construing sub-section one thereof. Questions I particularly have concerning that section are: Is this sub-section directed against hired haulers? Or, is it against anyone voluntarily hauling voters to the polls? Does it prohibit taxis' from hauling voters to the polls? Does it prohibit an individual from hauling himself to the polls to vote in an automobile or vehicle of any kind?"

Section 78.550 §1 provides:

"No person or persons shall use or employ any carriage or automobile or vehicle of any kind for the purpose of hauling voters to the polls on primary or election days."

The question you submitted requires an interpretation of the above statute.

Article 1, section 25 of the Missouri Constitution, 1945 provides:

Honorable William C. Batson, Jr.

"That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

The primary rule of construction of statutes is to ascertain the lawmaker's intent from the words used, if possible, and to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object and the manifest purpose of the statute, considered historically is properly given consideration. *Willis v. American National Life Insurance*, 287 S.W.2d 98. Generally, courts must seek to gather the intent of the legislature from the ordinary meaning of the word used considering its legislative history, and if necessary, considering also the circumstances and usages of the time, and must seek to promote the purpose and object of the statute and to avoid any strained or abused meaning. *St. Louis Southwestern Railroad v. Loeb*, 318 S.W.2d 246. It is another rule of construction that the intention of a statute will prevail over the literal sense of its terms. *State ex rel Kirks v. Allen*, 255 S.W.2d 144.

The statute under consideration has not been construed by any appellate court in this state. In *Coward v. Williams*, 4 S.W.2d 249, a Texas Court of Civil Appeals in an election contest case had under consideration a statute which provided:

"No vehicle shall be used by any person to convey voters to the polling place unless the voter is physically unable to or enter the polling place without assistance."

The court in construing the above statute stated *loc.cit.* 251:

". . . That law was enacted to prevent vehicles being used by candidates or other interested parties to convey voters to the polls. The custom had reached the stage before the law was passed that, in every town and village, vehicles were sent out in every direction to gather up prospective voters and convey them to the polls. It had become a species of petty bribery, and the law was passed to repress and destroy the practice. It was never contemplated that a man might not permit his friends and neighbors to ride with him to the polls. If the statute is literally con-

Honorable William C. Batson, Jr.

strued, a man could not take his wife, sons, and daughters with him in his automobile to the polls."

In *Edwards v. Roberts*, 233 S.W.2d 592 (Texas 1950) Walter Buck requested his nephew to haul him to the polls in an election as to the annexation of a school district. The court held this was not in violation of the above statute and cited *Coward v. Williams*, supra as authority.

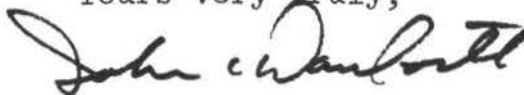
Section 78.550 §1 supra, does not prohibit an individual from using a conveyance to go to the polls. A literal interpretation of this statute would prohibit him from hauling other persons to the polls and it would prohibit any member of his family from using any conveyance to transport other members of his family to the polls. We do not believe the legislature intended any such restriction on the conduct of voters. It is a matter of common knowledge that candidates or other interested parties in the past have hired workers or offered free transportation to haul voters to the polls for the purpose of influencing their vote. We believe this type of conduct is what the legislature intended to prohibit and that it did not intend to prohibit a voter to use his own vehicle to go to the polls, or to prohibit members of a family from using vehicles to go to the polls, or to prevent a person hiring a taxi or other methods of transportation to go to the polls so long as it was not done for the purpose of influencing the manner in which the individual should vote.

CONCLUSION

It is the opinion of this department that Section 78.550 §1 RSMo 1959 prohibits only candidates and other interested parties from hauling voters to the polls with the intent and purpose of influencing their vote.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

AMBULANCES:
COUNTY COURTS:
FOURTH CLASS CITIES:
SPECIAL TAX LEVIES:
HOSPITALS:

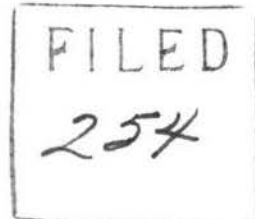
(1) A county operating an ambulance service under Section 67.300, RSMo Supp. 1967, may submit to the voters, under Section 137.065, RSMo 1959, a proposed increase in county revenue tax for the maintenance of such

service; (2) A fourth class city operating an ambulance service under Section 67.300, RSMo Supp. 1967, may levy a special tax to pay for such service under the provisions of Section 94.260, RSMo 1959; (3) The electors of a fourth class city may vote an increase in the rate of taxation under Section 94.250, RSMo 1959, to finance an ambulance service authorized by Section 67.300, RSMo Supp. 1967.

OPINION NO. 254

August 7, 1969

Honorable C.M. Bassman
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bassman:

This opinion is in response to your request in which you pose the following questions:

"Can a county operating an ambulance service under Section 67.300, 1967 Supp. RSMo. levy a special tax to pay for same under Chapter 205 or any other Chapter, dealing with Third Class Counties?"

"May a Fourth Class City operating an ambulance service under the same section levy a special tax to pay for same under Chapter 94.260, Paragraph (2)? Or may such a tax be levied under any other Section by a Fourth Class City?"

In answer to your question as to whether or not special tax levy funds which are authorized under the provisions of Chapter 205, and we presume you mean particularly Section 205.200, may

Honorable C.M. Bassman

be used for operating an ambulance service under Section 67.300, RSMo Supp. 1967, our answer is that such funds are limited to the uses specified. The county court operating an ambulance service under Section 67.300, RSMo Supp. 1967, has no authority to use such funds for general ambulance purposes. We did state in our Opinion No. 290, dated December 5, 1968, which was addressed to the Honorable Dennis C. Brewer, that a county hospital organized under the provisions of Section 205.160, RSMo et seq, may establish and maintain an ambulance service, supported in whole or in part by special tax levy funds pursuant to Section 205.200, RSMo Supp. 1967; but that such ambulance service could not be a general service and must be in direct connection with the services rendered county hospital patients.

In further answer to your first question, we call your attention to our Opinion No. 333, dated July 30, 1968, addressed to the Honorable Maurice B. Graham, which held that a county can submit to the voters, under Section 137.065, RSMo 1959, a proposed increase in county revenue tax for the establishment and maintenance of the ambulance service authorized by Section 67.300, RSMo Supp. 1967. Both of the above mentioned opinions are enclosed.

Your second question deals with whether or not a fourth class city operating an ambulance service under Section 67.300, RSMo Supp. 1967, may levy a special tax to pay for the service under Section 94.260, RSMo 1959.

Section 94.260, RSMo 1959, states in full as follows:

"In addition to the levy aforesaid for general municipal purposes, all cities of the fourth class are hereby authorized to levy annually not to exceed the following rates of taxation on all property subject to its taxing powers for the following special purposes:

(1) For library purposes in the manner and at the rate authorized under the provisions of sections 182.140 to 182.301, RSMo;

(2) For hospital, public health, and museum purposes, twenty cents on the one hundred dollars assessed valuation; and

(3) For recreation grounds in the manner and at the rate authorized under the provisions of sections 90.500 to 90.570, RSMo."

Honorable C.M. Bassman

As your question noted, Paragraph 2 contains specific language authorizing the levy for the special purpose of public health. In our view the term "public health" is a relative term and in the context of this section is sufficiently broad to include whatever is necessary for the health of the public generally and this would include ambulance service necessary to the community. We conclude therefore that a special levy is authorized under Section 94.260.

Further, consistent with our reasoning in our Opinion No. 333, 1968, above cited, we believe that an ambulance service operated by a city under the provisions of Section 67.300 is a "municipal purpose" within the meaning of Section 94.250, RSMo 1959, and therefore an increase in the rate of taxation is authorized pursuant to that section for such ambulance service.

CONCLUSION

It is therefore the opinion of this office that:

(1) A county operating an ambulance service under Section 67.300, RSMo Supp. 1967, may submit to the voters under Section 137.065, RSMo 1959, a proposed increase in county revenue tax for the maintenance of such service;

(2) A fourth class city operating an ambulance service under Section 67.300, RSMo Supp. 1967, may levy a special tax to pay for such service under the provisions of Section 94.260, RSMo 1959;

(3) The electors of a fourth class city may vote an increase in the rate of taxation under Section 94.250, RSMo 1959, to finance an ambulance service authorized by Section 67.300, RSMo Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



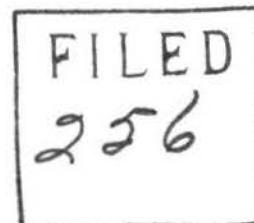
JOHN C. DANFORTH
Attorney General

Encs: Opinion No. 290, 12/5/68, Brewer
Opinion No. 333, 7/30/68, Graham

COUNTY COURT: In dividing county into county court
JUDGE DISTRICTS: judge districts contiguously located,
POPULATION: and as near equal in population as
HOW EQUALIZED: practicable, under Section 49.010,
RSMo 1959, county court in equalizing
population of districts is required by Section 1.100, RSMo 1959,
to use last preceding census report of United States for county.

June 24, 1969

OPINION NO. 256



Honorable G. William Weier
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri 63050

Dear Mr. Weier:

This official opinion is in response to your request for a ruling as to what measure of population should be used by the county court in redistricting the county court judge districts, under provisions of Section 49.010, RSMo 1959. Said section reads as follows:

"The county court shall be composed of three members, to be styled judges of the county court, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

Section 1.100, RSMo 1959, provides how the population of various subdivisions of the State, shall be determined, and reads as follows:

"1. The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this

section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961.

2. Any law which is limited in its operation to counties, cities or other political subdivisions, having a specified population or a specified assessed valuation, shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed."

The courts have long taken judicial notice of the census reports, and recognized them as the sole means for determining the population. It is believed the court stated the general rule in this respect, in Varble v. Whitecotton, 190 SW2d 244, in which it said at l.c. 246:

" . . . This court has always taken judicial notice of 'the official records of the census' and we find no case where the fact of population has been proved by other means. . . . "

Again, in Hardin v. Jefferson County, 147 SW2d 643, the question before the court was whether or not the county had sufficient population to authorize the county judges to constitute a board of road overseers under a certain statute. At l.c. 644, the court said:

"The legislature provided no special statutory method to determine the population of a county under Sec. 7892. Absent such a method, the question of

Honorable G. William Weier

population is fixed by the last decennial census, which is the census of 1930. . . . Thus it appears that the county judges of Jefferson County in 1931 did not constitute a Board of Road Overseers under Sec. 7892. If so, the county did not owe the plaintiff \$1,200 annual salary fixed by said section for services as a member of said board."

In view of the fact that Section 49.010, supra, provides no method by which the county court is to determine and equalize the population of the prospective county judge districts, it is believed that the holdings in above cited cases relative to census reports, and also provisions of Section 1.100, supra, are applicable. It is further believed that said Section 1.100, supra, requiring the use of the last United States decennial census report for certain purposes, including that of representation, is particularly applicable to the matter of inquiry. A matter of representation is involved here, as a county judge will be elected to represent the citizens of each district on the county court. Consequently, under provisions of said section, the last decennial census report of the United States of the population of Jefferson County shall be used by the county court in equalizing as nearly as practicable the population of the county court districts under provisions of Section 49.010, supra.

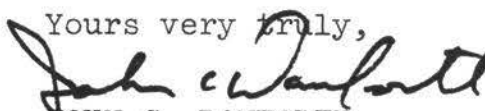
We are enclosing Opinions No. 166 rendered March 30, 1965, to Gerald Kiser; No. 114 rendered March 30, 1965, to Clifford A. Falzone; No. 427 rendered December 27, 1962, to Larry M. Woods; and No. 5 rendered June 19, 1952, to Charles V. Barker which may be helpful to you.

CONCLUSION

Therefore, it is the opinion of this office that in dividing the county into two county court judge districts, of contiguous territory and as near equal in population as practicable, under provisions of Section 49.010, RSMo 1959, the county court, in equalizing the population of the districts should use the last preceding decennial census report of the United States for the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,



JOHN C. DANFORTH
Attorney General

MUNICIPAL CORPORATIONS:
POLICE:

Independence, a Constitutional Charter City is not prevented by state law from empowering the Chief of Police to commission reserve policemen.

June 26, 1969

OPINION NO. 257

Honorable William R. Royster
State Representative
Room #414 - 8th District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Royster:

This is in response to your letter of recent date in which you requested an opinion of this office as to whether State law prohibits the City of Independence, Missouri, a Constitutional Charter City, from empowering its Chief of Police to commission reserve officers. These reserve officers would be citizens of Independence, not appointed to the regular police force, who are given the authority to make arrests.

In Missouri the organization and regulation of police is a state function. See: State ex rel. Hawes v. Mason, 153 Mo. 23 (1899); State ex rel Reynolds v. Jost, 265 Mo. 51 (1914). However, historically, local government units have performed this function until the state entered the field. For example, until 1861 St. Louis performed this function for its own police force. Even after the state took over the regulation of the police force of St. Louis it was recognized that the police bear a dual role - as both local and state officers. See Section 84.330 RSMo 1959. Nor is it inconsistent with the state's pre-eminent authority over the police to allow a city to itself control matters regarding its police force so long as that local authority is not taken away by conflicting or pre-empting state legislation. See: State ex rel. Arey v. Sherrill 142 Ohio St. 574, 53 N.E. 2d 501 (1944).

The General Assembly has purported to control police matters by statute in cities with a population between 300,000 and 700,000 and cities with a population of over 700,000 (ch. 84, RSMo) in first, second, third and fourth class cities (ch. 85 RSMo) and, in towns and villages (Sections 80.400 to 80.420 RSMo). It has not purported to do so explicitly with regard to constitutional charter cities as such. However, it might be relevant to note that cities with a population between 300,000 and 700,000 under the authority of Section 84.540 RSMo, may appoint persons not members of the regular force, as reserve policemen with the power to arrest. Under the provisions of Section 85.230 RSMo, cities of the first class may, by ordinance, authorize certain persons other than persons who are conservators of the peace under Sections 85.010 to 85.290 (relating to city police in first class cities) to make arrests. A similar provision exists with regard to second class cities. Section 85.340 RSMo. Moreover, there is no

Honorable William R. Royster

general prohibition on the appointment of reserve policemen.

CONCLUSION

It is the opinion of this office that no state law prohibits the City of Independence, a Constitutional Charter City, from empowering the Chief of Police to commission reserve policemen with the power to arrest.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Dennis J. Tuchler.

Yours very truly,

A handwritten signature in black ink, reading "John C. Danforth". The signature is written in a cursive style with a large, stylized initial "J".

JOHN C. DANFORTH
Attorney General

COUNTY CLERK: The County Court of Callaway County may
ELECTIONS: properly reimburse the County Clerk for
REGISTRATION: expenses actually and necessarily incurred
 by him in performing official duties re-
quired to be performed under the County Registration Law (Chapter
114, RSMo.).

August 28, 1969

OPINION NO. 258

Honorable Melvin D. Benitz
Prosecuting Attorney
Callaway County Courthouse
Fulton, Missouri 65251



Dear Mr. Benitz:

This is in response to your letter of May 8, 1969, in which you asked for an opinion on the question of whether or not the County Clerk of your County could receive necessary and actual expenses incurred by him in fulfilling the duties under the county voter registration law (Chapter 114, RSMo.).

We answer your question in the affirmative. Section 114.110-1. provides:

"The county court shall provide for and pay the expenses incurred under the operation of this chapter." (Section 114.110-1., RSMo Supp. 1967)

We interpret this to be adequate authority for the County Court to reimburse the County Clerk only for his " . . . bona fide, reasonable and actual expenditures for indispensable expenses of the office . . . " (Rinehart v. Howell County, 153 S.W.2d 381, 382 (Div. 2, 1943)).

The fact that the County Clerk's salary and compensation is fixed by Chapter 51, RSMo, does not preclude this result, for we believe it well settled that these terms are different from the word "expenses".

Honorable Melvin D. Benitz

"This question, whether allowances to officers for expenses come within the meaning of the word 'compensation', has arisen in several cases.

* * * * *

"From these authorities, the reasoning quoted, and the principle last mentioned it follows that the provision for the payment of expenses of circuit judges did not provide additional 'compensation' in the constitutional sense or in the sense of section 10695, RS 1909," (Macon County v. Williams, 224 S.W. 835, 836, 837 (Mo. en banc 1920)).

What expenses are actually and necessarily incurred by the County Clerk in performing duties pursuant to Chapter 114 should, we think, be left in the first instance to the judgment of the County Court, which has the:

" . . . discretionary quasi-legislative function and duty, State ex rel Dietrich v. Daves, 315 Mo. 701, 287 S.W. 420, of determining the necessity and amount of expenditures not otherwise specifically provided for by statute . . . " (Miller v. Webster County, 228 S.W. 2d 706, 708 (Div. 2, 1950)).

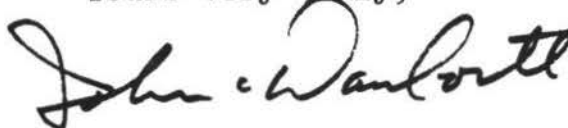
However, as an example, we believe the County Court could properly pay the Clerk's travel expenses for trips around the County of Callaway other than daily commuting to and from work and residence insofar as such travel is determined by the County Court to be indispensably necessary in carrying out his official duties.

CONCLUSION

It is the opinion of this office that the County Court of Callaway County may properly reimburse the County Clerk for expenses actually and necessarily incurred by him in performing official duties required to be performed under the County Registration Law (Chapter 114, RSMo).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Yours very truly,



JOHN C. DANFORTH
Attorney General

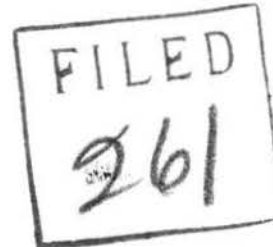
CITIES:

Statutes imposing liability on first and second class cities for riot damage do not apply to Constitutional Charter City.

June 12, 1969

OPINION NO. 261

Honorable Kenneth J. Rothman
Representative
Room #410
36th District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Rothman:

This official opinion is issued in response to your request dated May 13, 1969, in which you ask whether the provisions of Section 537.130 and 537.140, RSMo 1959, apply to the City of University City. Section 537.130 RSMo makes participants in a riotous assemblage liable for damages to person and property arising out of the assemblage, and Section 537.140 makes cities of the first and second class liable for such damage with right of recovery over against the participants.

The City of University City adopted a charter on February 4, 1947, pursuant to the provisions of Section 19 of Article VI of the Constitution of Missouri, 1945. It is, therefore, a "Constitutional Charter City" as defined in Section 82.010 RSMo.

Section 19 of Article VI of the Constitution of Missouri provides in part as follows:

" * * * If the charter be approved by the voters it shall become the charter of such city at the time fixed therein and shall supersede any existing charter and amendments thereof. * * * "

In the case of *Kansas City vs. Marsh Oil Company*, 140 Mo. 458 the Supreme Court said l.c. 471:

" * * * A charter is the organic law of a city in this State whether it emanate from the General Assembly, or is framed and adopted by the people of the municipality by authority of the Constitution. * * * "

It follows that the "charter" of a city whether such charter consisted of statutes applicable to one of the four classes of cities or a "special" charter created by enactment of specific statutes providing for the establishment of such city is completely superceded by the adoption of a charter under the provisions of Section 19 of Article VI of the 1945 Missouri Constitution.

Honorable Kenneth J. Rothman

It is apparent, therefore, that a law applicable to cities of one or more of the four classes in Missouri do not apply to a city which has adopted a charter under provisions of Section 19 of Article VI of the 1945 Constitution of Missouri.


Our conclusion is supported by an additional circumstance with regard to University City. Prior to its adoption of a charter in 1947, University City was a city of the fourth class. Sections 537.130 and 537.140 RSMo, therefore, never by their terms applied to the City of University City at any time.

CONCLUSION

It is the official opinion of this office that Sections 537.130 and 537.140, RSMo 1959, imposing liability on cities of the first and second class for damages from riotous assemblage, do not apply to a city which adopted a charter pursuant to Section 19 of Article VI of the Missouri Constitution of 1945.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,

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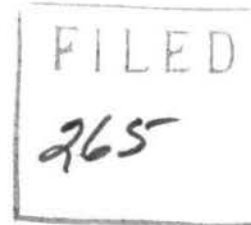
JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
SCHOOLS:

A public school board may not allow the use of public school property by the Ministerial Alliance to conduct religious training.

OPINION NO. 265

October 30, 1969



Honorable Ronald Reed, Jr.
Representative - 81st District
2602 Francis Street
St. Joseph, Missouri 64501

Dear Mr. Reed:

This opinion is issued in response to your request for an opinion. You inquire:

"Is it legal to grant usage of public school classrooms once per week to conduct religious training on a non-denominational basis by the Ministerial Alliance after the regular day session terminates?"

In *Dorton v. Hearn*, 67 Mo. 301 (1878), the Missouri Supreme Court held that the board of directors of a school district could not authorize the use of a school building for a Sunday school. The following language of the opinion illustrates the reasoning of the Court. 1.c. 302:

"A corporation, . . . is not only restricted from making contracts forbidden by its charter, but can only make those which are necessary to effectuate the purposes of its creation. It is not pretended that any direct authority is given in the school law justifying or authorizing the action of the board in this case, nor has it any connection with the object for which the house was built. . . ."

It appears, therefore, that public school classrooms cannot be used for religious training in the absence of statutory authority.

Honorable Ronald Reed, Jr.

Subsection 2 of Section 177.031, RSMo Supp. 1967, provides as follows:

"The school board having charge of the school-houses, buildings and grounds appurtenant thereto may allow the free use of the houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for any other civic, social and educational purpose that will not interfere with the prime purpose to which the houses, buildings and grounds are devoted. If an application is granted and the use of the houses, buildings or grounds is permitted for the purposes aforesaid, the school board may provide, free of charge, heat, light and janitor service therein when necessary, and may make any other provisions, free of charge, needed for the convenient and comfortable use of the houses, buildings and grounds for such purposes, or the school boards may require the expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, is permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly results from the use, ordinary wear and tear excepted.

The legislature first authorized the use of public school property for non-public school purposes in 1881. It is interesting to note that this occurred shortly after the decision in *Dorton v. Hearn*, 67 Mo. 301 (1878), showed the need for express legislative authorization. Laws 1881, p.202, provided as follows:

"Nothing in this section shall be so construed as to prevent the use of any school house for religious, literary or other public purposes, when such use shall be demanded by a majority of the voters of such district, . . ."

After the addition of language by Laws 1891, p. 215, this provision read as follows:

"Nothing in this section shall be so construed as to prevent the use of any school-house for religious, literary or other

Honorable Ronald Reed, Jr.

public purposes, or for the meeting of any farmer or labor organization or society for educational purposes, . . . when such use shall be demanded by a majority of the voters of such district. . . ."

The provision was amended again in 1909, but the authorized purposes remained the same. Laws 1909, p. 770, section 28.

Significant changes were made, however, in 1915. House Bill No. 392, amended Section 10784 of the Revised Statutes of 1909, which included the above quoted language, as amended by the Laws of 1909, so that it read as follows:

". . .The board of directors, or board of education, having charge of the school houses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted: . . ."
Laws 1915, p. 382.

With minor changes, the authorized purposes remain the same as those set forth in 1915. Section 177.031 (2), RSMo Supp. 1967.

From 1881 until 1915, religious purposes were expressly mentioned as an authorized use of public school property. The reference to religious purposes was dropped in 1915. It is logical to assume, therefore, that the legislature intended in 1915 to revoke the authority previously given to allow the use of public school property for religious purposes.

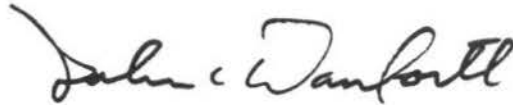
Such a construction of Section 177.031 avoids the difficult questions of state and federal constitutional law that would arise if public school property were used for religious purposes. See *Zorach v. Claiborn*, 343 U.S. 306 (1952); *McCullum v. Board of Education*, 333 U.S. 203 (1948); *Special District for Education and Training of Handicapped Children v. Wheeler*, 408 S.W.2d 60 (1966); *Berghorn v. Reorganized School District No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (1941). Indeed, the 1915 amendment may have been motivated by the constitutional problems raised by the use of public school property for religious purposes.

Honorable Ronald Reed, Jr.

CONCLUSION

It is the opinion of this office that a public school board may not allow the use of public school property by the Ministerial Alliance to conduct religious training.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" following in a similar style.

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:
COMMERCIAL MOTOR VEHICLES:

A station wagon used to transport tools used in repair work is not a commercial motor vehicle.

OPINION NO. 267

September 9, 1969



Honorable Ray S. James
State Representative - 5th District
6421 Brookside Road
Kansas City, Missouri 64113

Dear Representative James:

In your letter of May 15, 1969, you requested an opinion from this office as follows:

"Is a stationwagon which is used to transport tools from one place to another to do repair work classified as a 'commercial motor vehicle.'"

Chapter 301 RSMo 1959, governs the registration and licensing of motor vehicles in this state. Section 301.010 RSMo defines the different types of motor vehicles which are required to be registered and licensed. It provides in part as follows:

"(1) 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers."

A station wagon is not described as such by the statute, but we assume it to be a self-propelled motor vehicle designed primarily as a passenger carrying vehicle.

In an opinion issued by this office on December 24, 1959, to Honorable Paul E. Williams, Prosecuting Attorney, Pike County, Missouri, we held a pickup truck used primarily for transporting persons and which is not used regularly for hauling freight and merchandise was a commercial motor vehicle under the above statute and required to be registered and licensed as such. The word "designed" and "freight and merchandise" are defined in this opinion, a copy of which is enclosed herewith.

Honorable Ray S. James

Such an opinion is based on the fact that the motor vehicle was designed by the manufacturer for the purpose of carrying freight and merchandise, even though it was not used for that purpose.

In an opinion issued by this office to Honorable John P. Ryan, State Senator, dated May 14, 1968, we ruled that an employee of a manufacturer who regularly drove a pickup truck owned by the company hauling tools and instruments used in the performance of his various tasks, and which truck was also carrying replacement parts, was a commercial motor vehicle and the driver was required to be licensed as a chauffeur. In reaching this conclusion, the pickup truck was considered as a commercial vehicle because it was designed for carrying freight and merchandise.

In an opinion issued by this office on August 25, 1969, to Harold L. Caskey, Prosecuting Attorney, Bates County, Missouri, a copy of which is enclosed herewith, we held a motor vehicle designed as a passenger carrying vehicle, but regularly used to transport freight and merchandise is required to be registered as a commercial motor vehicle. This opinion is based on the fact that it is regularly used to transport freight and merchandise.

Attention is called to the language of the statute which defines "commercial motor vehicle" as one designed or regularly used for carrying freight and merchandise. In *State v. Laswell*, 311 S.W.2d 356, the court construed the word "freight" as used in the above statute to mean the transportation of goods, and "merchandise" as embracing all tangible articles of commerce -- whatever is usually brought and sold in trade. Webster's International Dictionary, 3rd Edition defines merchandise as "The objects of commerce; whatever is usually brought or sold intrade; wares, goods; an act or business of trading, trade traffic."

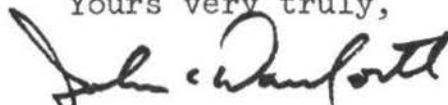
It is our view, that tools used for repair work and which are not for sale, do not come within the meaning of "freight and merchandise" as those terms are used in the above statute.

CONCLUSION

It is the opinion of this department, that a motor vehicle designed as a station wagon and used only to transport tools used in repair work is not a commercial motor vehicle under Section 301.010 RSMo, 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. 311 - 8-25-69
Caskey

December 16, 1969

OPINION LETTER NO. 270

Honorable Ray Lee Caskey
Prosecuting Attorney
P.O. Box 278
Alton, Missouri 65606



Dear Mr. Caskey:

This letter is in response to your opinion request in which you ask whether or not an elected member of a county board of education is a county official within the meaning of Section 182.050, RSMo 1959, which section excludes county officials from membership on the county library board of trustees.

Section 182.050 states in part as follows:

"For the purpose of carrying into effect sections 182.010 to 182.120 in case a county library district is established and a free county library authorized as provided in Section 182.010, within sixty days after the establishment of the county library district, there shall be created a county library board of trustees, which shall consist of the county superintendent of schools, and four other members, none of whom shall be elected county officials. . . ."

The county to which you refer is a county of the third class. Section 162.111, RSMo Supp. 1967, created in each second, third and fourth class county a county board of education consisting of six members to be elected at the annual school election held on the first Tuesday in April in each year.

Although the county board of education is legally designated as the "county" board, nevertheless it is clear that the boundaries of the board's jurisdiction are not coterminous with the county lines. The expenses of the county board members are paid by the

Honorable Ray Lee Caskey

state comptroller out of the state school moneys fund, Section 162.151, RSMo Supp. 1967, and the duties of the county board of education, Sections 162.161, RSMo Supp. 1967, although official in character are nevertheless not limited to the county itself.

We are enclosing Opinion No. 263 rendered May 2, 1968, to Maurice B. Graham which holds that the prosecuting attorney is required to represent the county board of education.

We believe it is unnecessary to determine whether members of the county board of education are county officers for all purposes because it is clear that in interpreting statutes, it is the legislative intent that is important and not the strict letter of the terms used by the legislature. That is to say, it is noteworthy that in Section 182.050, the legislature apparently intended to exclude from membership on the county library board of trustees any person who is elected to a county-wide office by the county electorate with the exception of the county school superintendent. The legislature did not exclude appointed officers of the county.

It is our view that it was the apparent legislative intent to exclude from membership on the county library district board of trustees, with the exception of the county superintendent of schools, officials who exercise authority generally coterminous with the boundaries of the county although not necessarily confined to such boundaries and whose position, as in the case of the members of the county board of education, is largely dependent upon the vote of such county electorate.

We, therefore, conclude that members of the county board of education are "elected county officials" within the meaning of Section 182.050 and are not eligible for appointment to the county library board of trustees.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 263, Graham, 5/2/68

TRUTH IN LENDING:
DIVISION OF FINANCE:
CREDIT:

Federal Truth In Lending Act super-
sedes Missouri Credit Law where
disclosures would be inconsistent
with federal system; other provisions
of Missouri law remain in force.

OPINION NO. 271

October 9, 1969

Mr. C. W. Culley
Commissioner of Finance
Department of Business and
Administration
12th Floor-Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Culley:

This is in response to your request for an opinion from this office regarding several matters dealing with "Truth in Lending" disclosures. You indicate the underlying question is ". . . whether regulated extenders of credit in Missouri must make two virtually identical disclosures, one using the terminology required by the federal regulation and the other using the words of the Missouri law?"

With regard to the matter of terminology, the Truth in Lending Act itself does not require the use of any particular terminology, 15 U.S.C., §1632(a); however, Federal Reserve Regulation Z, 34 Fed. Reg. 2002 (1969), does require that particular terminology be used in making the various disclosures, §§226.6(a), 226.7, and 226.8. The applicable Missouri statutes require that contracts involving credit contain certain enumerated items but do not require that any particular terminology be used in conveying the required information, §365.070-6, RSMo Supp. 1967, Laws 1963 p. 466 §7 ("shall contain the following items"); §408.130-1, RSMo Supp. 1967, Laws 1965 p. 114 §1 ("a written statement . . . showing in clear and distinct items"); §408.260-5, RSMo Supp. 1967, Laws 1961 p. 638 §3 ("shall contain the following items"). Thus although it is clear that use of Missouri terminology would not satisfy the requirements of Regulation Z, it is the view of this office that where the information conveyed under the federally required disclosure is the same as that required under a corresponding Missouri statute, disclosure in federal terminology satisfies the Missouri requirement.

Mr. C. W. Culley

However, as is indicated below, there are differences in addition to those dealing with terminology or labels between the federal statute and regulations on the one hand and the Missouri statutes on the other. The federal statute, 15 U.S.C., §1610(a), provides by implication that a creditor need not comply with any inconsistent state laws; thus to the extent that Missouri law is inconsistent with the federal law a creditor need make only the federally required disclosures. Where there is an inconsistent Missouri disclosure, a creditor may make such disclosure, but only if the disclosure is made on a separate paper or is made on the same statement below a conspicuous demarcation line and conspicuously labeled as inconsistent; in the later case, the federally required disclosures must be identified as such by a clear and conspicuous heading. Federal Reserve Regulation Z, §226.6(c).

The substantive differences between the Missouri disclosure requirement and the federal requirements can be indicated in connection with the various questions you have posed. The first specific question asked is:

"Specifically, will the use of the term 'unpaid balance' suffice in satisfying subdivision (9) of §365.070 6. and subdivision (6) of §408.260 5."

The above mentioned sections require that the "principal balance" be disclosed. "Unpaid balance" is the federally required terminology; and the elements included in that term are the "unpaid balance of the cash price" and all other charges, individually itemized, which are included in the amount financed but are not part of the "finance charge." "Finance charge" under the federal requirements includes, among other things: "Charges or premiums for credit life, accident, health, . . . insurance, written in connection with any [consumer] credit transaction. . . ." except in certain specified situations, i.e., where the insurance coverage is not a factor in the approval of the extension of credit, 15 U.S.C., §1605(b); Federal Reserve Regulation Z, §226.4(a)(5), 34 Fed. Reg. 2004 (1969). Also included in the term "finance charge" under the federal requirements are "Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, . . ." unless the creditor furnishes a statement in writing to the person to whom credit is extended of the cost of the insurance if obtained from or through the creditor, and stating that the person to whom credit is extended may choose through whom the insurance is to be obtained, 15 U.S.C., §1605(c); Federal Reserve Regulation Z, §226.4 (a)(6), 34 Fed. Reg. 2004 (1969). Although the cost of the above type of insurance is included in the term "finance charge" under the federal requirements, except in those particular instances noted, and thus will not be one of the elements of the figure "unpaid balance," the contrary is the case under the Missouri requirements. §365.070, RSMo Supp. 1967, Laws 1963 p. 446 §7, provides that the

Mr. C. W. Culley

"principal balance" is the sum of certain items, among which are: "The aggregate amount, if any, if a separate identified charge is made therefor, included for all life, accident or health insurance, . . ." and "The amounts, if any, if a separate identified charge is made therefor, included for other insurance and benefits, . . ."

Likewise, §408.260, RSMo Supp. 1967, Laws 1965 p. 95 §2, provides that one of the elements of the "principal balance" is: "The amount, if any, if a separate charge is made therefor, included for insurance and other benefits, . . ."

Furthermore in Missouri, both §365.070, RSMo Supp. 1967, and §408.260, RSMo Supp. 1967, require that the principal balance include the amount of official fees and insurance. The term "official fees" is defined in §365.020, RSMo Supp. 1967, and in §408.250, RSMo Supp. 1967, as ". . .the fees prescribed by law for filing, recording, or otherwise perfecting and releasing or satisfying any title or lien retained or taken by a seller in connection with a retail time transaction." Federal Reserve Regulation Z, §226.4(b) provides that if itemized and disclosed to the customer, certain fees and charges paid to public officials, taxes not included in the cash price, and license fees need not be included in the finance charge; when so itemized they are classified in a separate category for other charges, Federal Reserve Regulation Z, §226.8(c)(4). If they are not itemized and separately disclosed, they must be considered a part of the finance charge for federal purposes under 15 U.S.C., §1605(d)(1), see Federal Reserve Regulation Z, §226.4. If they are disclosed, they would appear as part of the federally specified "unpaid balance," although not as part of the "unpaid balance of cash price."

Thus, as a general rule, the elements of insurance, taxes not included in the cash price, and official fees will not enter into the calculations to determine "unpaid balance" for the federal disclosure, but those elements will be a factor in the calculations to determine "principal balance" for the Missouri disclosure. Therefore, the use of the term "unpaid balance" will not necessarily satisfy the disclosure of the "principal balance" as required by Missouri statutes.

The second specific question is:

"Will 'finance charge' satisfy subdivision (10) of §365.070 6. and subdivision (7) of §408.260 5. which use the terms 'time price differential' and 'time charge' respectively?"

"Time charge" is defined as, ". . .the amount, however denominated or expressed, in excess of the cash sale price under a retail charge agreement or the principal balance under a retail time contract which a retail buyer contracts to pay or pays for goods or services. It includes the extension to the buyer of the privilege of paying therefor in one or more deferred payments." §408.250(12), RSMo Supp. 1967, Laws 1961 p. 638 §2. "Time price differential" is defined as, ". . . the amount, however denominated or expressed, as limited by section 365.120, in addition to the principal balance to be paid

Mr. C. W. Culley

by the buyer for the privilege of purchasing the motor vehicle on time to be paid for by the buyer in one or more deferred installments;" §365.020(14), RSMo Supp. 1967. Insofar as either "time charge" or "time price differential" is determined in relation to "principal balance," it is apparent that the figure for either may not be the same as the figure for the federally required "finance charge." For, as mentioned previously, the insurance premiums generally will be included in the figure for "finance charge" under the federal requirements, while under the state requirements the insurance premiums would generally be included in the figure "principal balance" rather than in the figure for "time charge" or "time price differential."

Further discrepancies could also arise between the figure for "finance charge" and the figure for either "time charge" or "time price differential." For example, under the federal requirements official fees are to be included as elements of the "finance charge" unless itemized and disclosed to the customer, 15 U.S.C., §1605(d) (1), Federal Reserve Regulation Z, §226.4(b)(1), 34 Fed. Reg. 2004 (1969). If they are so itemized and disclosed, they are to be included in "other charges." §408.260-5(5), RSMo Supp. 1967, indicates that official fees are to be separately stated and then are included in the figure for "principal balance." Thus although they are not included as a part of the "time charge," specified by state law, they will be a part of the federally required "finance charge" unless itemized and disclosed.

The next specific question is:

"Will 'total of payments' satisfy subdivision (10) of §365.070 6. and subdivision (8) of 408.260 5. which use the term 'time balance'?"

Federal Reserve Regulation Z, §226.8(b)(3), 34 Fed. Reg. 2008 (1969), requires that for credit other than open end, the creditor shall disclose "The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, . . . the sum of such payments using the term, 'total of payments.'" §365.070-6(11), RSMo Supp. 1967, Laws 1963 p. 446 §7, requires in retail installment contracts that the creditor disclose "The total amount of the time balance stated as one sum in dollars and cents, which is the sum of items (9) and (10), [principal balance and time price differential] payable in installments by the buyer to the seller, the number of installments, the amount of each installment and the due date or period thereof; . . ." §408.260-5(8), RSMo Supp. 1967, Laws 1965 p. 95 §2, provides that the contract shall contain "The amount of the time balance, which is the sum of items (6) and (7), [principal balance and time charge] payable in one or more deferred payments

Mr. C. W. Culley

by the buyer to the seller, the amount of each such payment and the due date or period thereof;". Although individual calculations are made and treated somewhat differently along the way under the federal and state requirements, as has been indicated above, the total indebtedness figure will be the same under the federal or state requirements on any particular sale or loan, and so also will be the number of payments, the amount of each and the due date or period of each. Therefore, it is the view of this office that the federal requirements as to this particular disclosure are compatible with the comparable Missouri disclosure requirements.

The next question is:

"Will 'deferred payment price' satisfy the requirements of subdivision (12) of §365.070 6. and subdivision (9) of §408.260 5.?"

Again, as was the case of the prior inquiry, although the various elements going together to make up the "deferred payment price" or the "time sale price" may be labeled in different ways and treated somewhat differently depending upon whether the disclosure is in accordance with federal or state requirements, the sum of the various items will make the same total in either instance. Federal Reserve Regulation Z, §226.8(c)(8) defines "deferred payment price" to be the cash price, plus the finance charge, plus all other charges which are included in the amount financed but which are not part of the finance charge. Under §408.250(13) and §365.020(15), RSMo Supp. 1967, "time sale price" means the total of the cash sale price of the item sold, the amount included for any insurance and other benefits separately identified, official fees, and the time charge or time price differential. Therefore, it is the view of this office that on any particular loan or sale, compliance with the federal requirement as to statement of the "deferred payment price" is compatible with the Missouri statutory requirement that the "time sale price" be disclosed.

The next question is:

"Are there any terms in the third column [of the sheet attached to the request] which would not satisfy the similar disclosure requirements of the 'motor vehicle time sales act' or the 'retail credit sales act'?"

The terms in the third column referred to in the question are some of the federally required terms. It is the view of this office that there are substantive differences in some of these terms, and thus the related Missouri requirements are inconsistent. Consider first the federal term "cash price" and the corresponding state

Mr. C. W. Culley

term "cash sale price." Elements of "cash price" are set forth in Federal Reserve Regulation Z, §226.2(i), 34 Fed. Reg. 2003 (1969), and may include taxes to the extent imposed on the cash sale "but shall not include any other charges of the types described in §226.4." Among the items included in the charges described in §226.4, the section prescribing elements of the finance charge, are: fees and charges paid to public officials, license fees, registration fees, and certificate of title; and in real property transactions, fees or premiums for title examination, abstract of title, and title insurance. "Cash sale price" is defined in §408.250(9), RSMo Supp. 1967, Laws 1961 p. 638 §2, and the statute provides official fees may be included and, where real property is involved, reasonable fees and costs actually to be paid for construction permits and similar fees, the services of an attorney and any title search and title insurance. The definition of "cash sale price" under §365.020(1), RSMo Supp. 1967, Laws 1963 p. 466 §2, includes registration, certificate of title, license, and other fees. It appears that items which the Missouri statutes contemplate being categorized under the heading "cash sale price" are items which the federal law categorizes under "finance charge" or "other charges." In making the federal disclosure these items will not appear in "cash price."

The question next arises as to the proper application under Missouri law of the provision that official fees "may" be included in "cash sale price." It is the opinion of this office that any amounts required by §408.260-5(5), RSMo Supp. 1967, to be disclosed as "official fees" cannot be included as an element in the cash sale price. Such amounts must be disclosed under the separate category and their inclusion in the basic cash sale price would result in a double addition of the amounts in making the final calculation of the time sale price.

For the remaining items, it is apparent that the method of handling these elements under the Missouri statutes is contrary to the method expressly directed by federal law. There is also the danger that disclosures complying with the federal requirements will be viewed as falling short of compliance with the spirit and intent of the Missouri statutes.

This latter problem arises in the matter of down payment and trade-in. The federal disclosure provisions regarding trade-in do not require any description of the property traded in. Federal Reserve Regulation Z, §226.8(c)(2), 34 Fed. Reg. 2008 (1969), 15 U.S.C., §1638(2), while the Missouri provisions for both the motor vehicle contracts and retail time contracts require "a brief description of the goods traded in," §365.070-6(2), RSMo Supp. 1967, Laws 1963 p. 466 §7; §408.260-5 (2), RSMo Supp. 1967, Laws 1965 p. 95 §2. Thus mere conformity in this regard with the federal requirement would not satisfy a substantive Missouri disclosure requirement.

Mr. C. W. Culley

In this instance, the Missouri law is not superseded by the federal provisions and a seller must, in addition to making the federal disclosures, set out the additional information required by state law.

For the reasons mentioned previously with regard to the elements of "cash price" and "cash sale price," there is the same danger of inconsistency between the federal provisions and substantive Missouri requirements insofar as the terms "unpaid balance of cash price" (federal terminology) and "the difference" (Missouri terminology) are concerned. If there is in fact a difference between the figures for "cash sale price" and "cash price," it is apparent that there will be a corresponding difference in the figures for "the difference" and "unpaid balance of cash price" because the identical amount of down payment and trade-in is deducted from "cash sale price" under Missouri law and "cash price" in the federal scheme.

The federal term "all other charges" you have associated with the Missouri requirement dealing with charges for insurance coverage and other benefits separately described. As mentioned previously, the figures representing these items would vary depending upon whether the disclosure is made in conformity with the federal requirements or in conformity with the state requirements. It will be recalled that "other charges" typically will not include charges for insurance coverage, unless itemized and disclosed to the customer, this item being part of the "finance charge." Additionally, some of the items which, if separately itemized and disclosed, the federal requirements contemplate showing under the heading of "other charges" include items which the state requirements authorize to be included under the heading "cash sale price," e.g.: license, certificate of title, and registration fees, see §365.020(1), RSMo Supp. 1967; title insurance and preparation of abstract, see §408.250(9), RSMo Supp. 1967. Official fees not itemized and disclosed are a part of the "finance charge," 15 U.S.C., §1605(d)(1), see Federal Reserve Regulation Z, §226.4(a) and (b); under the federal requirements and thus would be given a treatment different from that required in Missouri. In Missouri official fees are designated as such and disclosed as a separate item, see §365.020(6), RSMo Supp. 1967, Laws 1963 p. 466 §2; §365.070-6(8), RSMo Supp. 1967, Laws 1963, p. 466; §408.250(10), RSMo Supp. 1967, Laws 1961, p. 638 §2; §408.260-5(5), RSMo Supp. 1967, Laws 1965, p. 95 §2.

As has been previously mentioned, the terms "unpaid balance" and "principal balance" would not necessarily be represented by the same numerical figure due to the differing methods of calculation and assignment of cost figures used under the Missouri and federal systems of disclosure. Also set forth above is our conclusion that "finance charge" under the federal disclosure requirements does not have the same meaning or contain the same elements as either "time price differential" or "time charge" under state law.

Mr. C. W. Culley

Your next specific question is:

"Does the use of the term 'previous balance', which is defined in §226.7(b) (1) as being 'the outstanding balance in the account at the beginning of the billing cycle', and the term 'new balance', which is defined in §226.7(b) (9) as being 'the outstanding balance in the account on the closing date of the billing cycle', satisfy the requirements of §408.290 2. (1) which calls for disclosure of 'the total unpaid balance under the retail charge agreement at the beginning and end of the period'?"

It is the view of this office that compliance with the federal requirement in this regard is consistent with the corresponding state requirements, for the reason that the numerical information disclosed in complying with the federal requirements will be precisely the same numerical information which the state statute requires.

Your next question is:

"Will the use of the federally required term 'finance charge' satisfy the state requirement of §408.290 2(4) for disclosure of 'the amount of the time charge'?"

As mentioned previously, the federal term "finance charge" may contain elements considerably different from that contemplated by the state term "time charge," and thus the various terms may be represented by different figures depending upon whether certain elements are involved in a given transaction or not, e.g., insurance. Retail charge agreements may well represent a situation where the various "elements" in addition to the price marked on an item are relatively few. If the only elements are a charge for interest and a charge for the service of extending credit, the total figures involved under either the federal "finance charge" or the state "time charge" would be identical. As other elements are added which are allocated differently under the two systems of disclosure, then problems of nonconformity arise in this area,

The next question is:

"Does the use of the term 'amount financed' as required by §226.8(d)(1) satisfy the requirement of §408.130 1.(5) which calls for 'the principal amount of the loan, excluding interest'?"

It is the view of this office that the terms are not necessarily interchangeable. "Amount financed" in the federal requirements

Mr. C. W. Culley

does not include premiums for insurance, the latter figure being included instead in the "finance charge," Federal Reserve Regulation Z, §§226.4(5) and (6); 226.8(d)(1), 34 Fed. Reg. 2008 (1969). §367.170, RSMo 1959, provides, ". . . Insurance premiums shall not be considered as interest, service charges or fees in connection with any loan. . . ." §408.130-1(5), RSMo Supp. 1967, requires that "The principal amount of the loan excluding interest;" be disclosed. Thus where insurance is required, the figure which represents the "principal amount of the loan," under the Missouri requirement, may well differ from the figure which represents the "amount financed."

The final question is:

"Does the disclosure of the dollar amount called 'finance charge' and the interest rate called 'annual percentage rate' as required by Regulation Z satisfy the requirement of 'the rate or amount of interest as the contract may provide' [§408.130 1. (6)]?"

It is the view of this office that the federally required disclosure in this regard is not necessarily the equivalent of the state disclosure requirement and therefore the federal requirement must prevail. As mentioned previously, "finance charge" may include a number of items in addition to interest charges. Further, the "annual percentage rate" is not a figure which reflects only interest charges. The "annual percentage rate" of "finance charge" is what is involved in the federal disclosure, 15 U.S.C., §1606, Federal Reserve Regulation Z, §226.5, 34 Fed. Reg. 2004, 2017 (1969). The elements and calculations of the "annual percentage rate" being different from the elements and calculations for determining the "rate or amount of interest," the resulting figures would also differ.

CONCLUSION

It is the opinion of this office that where there is a conflict between state provisions on disclosure of credit information and federal law, as set forth in Title 1 of the Federal Consumer Credit Protection Act, known as the "Truth In Lending Act," and "Federal Reserve Regulation Z," regulated extenders of credit in Missouri to whom the federal law applies are required only to make those disclosures of credit information required by federal law. The principal divergencies between the federal and the Missouri system are in their treatment of items such as insurance and fees paid for official acts, including registration and licensing. The Missouri scheme contemplates that these items be included in the principal balance, but under the federal provisions they are considered as part of the charge for financing unless individually itemized.

Mr. C. W. Culley

If a creditor wishes to make inconsistent disclosures as required by Missouri law, he must do so in the manner prescribed by Federal Reserve Regulation Z, §226.6(c).

The federal law supersedes the Missouri law only to the extent of any inconsistency, however, and regulated extenders of credit in Missouri must comply with state requirements in all other situations. An example set forth above is the Missouri requirement that where a retail credit sale involves a trade-in, the contract must include "A brief description of the goods traded-in," see §408.260-5(2), RSMo Supp. 1967; §365.070-6(2), RSMo Supp. 1967; these provisions do not conflict with federal law and Missouri creditors must therefore comply with them.

Additionally, the requirements of the Missouri statutes for retail time and installment contracts to contain a specified "Notice to the Buyer"--see §365.070-2, RSMo Supp. 1967; §408.260-5, RSMo Supp. 1967--are not superseded by federal law and thus remain in full force and effect. A further requirement of the Missouri laws which, by way of example, must also be complied with is the provision of §408.290-1, RSMo Supp. 1967, that every retail charge agreement shall be in writing and shall be signed by the retail buyer.

The foregoing instances are cited merely by way of illustration and are not meant to be a complete listing. Missouri law is superseded by the federal law only to the extent of any actual inconsistency. Furthermore, one who does not come within the coverage of the federal law must comply with all applicable provisions of Missouri law whether or not they are inconsistent with federal law. For example, a Missouri retail seller who does not regularly extend or arrange for the extension of credit, and thus is not covered by the federal act, 15 U.S.C., §1602(f), but who makes a sale under a retail time or installment contract must comply with the applicable Missouri statutory scheme in full.

Answers to your specific questions are as follows:

1) Disclosure of the federally prescribed "unpaid balance" is not always consistent with the requirements of subdivision (9) of §365.070-6, and subdivision (6) of §408.260-5 (principal balance).

2) Disclosure of the federally prescribed "finance charge" is not always consistent with subdivision (10) of §365.070-6, and subdivision (7) of §408.260-5, which use the terms "time price differential" and "time charge" respectively.

3) Disclosure of the federally prescribed "total of payments" is consistent with subdivision (10) of §365.070-6, and subdivision (8) of §408.260-5 which use the term "time balance."

Mr. C. W. Culley

4) Disclosure of the federally prescribed "deferred payment price" is consistent with the requirements of subdivision (12) of §365.070-6 and subdivision (9) of §408.260-5 (time sales price.)

5) There are substantive differences between certain terms required by Regulation Z and related requirements of the Missouri "motor vehicle time sales act" and "retail credit sales act" which make it unnecessary for a creditor who must make the federally required disclosures to comply with Missouri law.

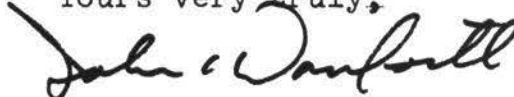
6) In retail charge agreements, disclosure of the federally prescribed "previous balance," which is defined in §226.7(b)(1) as being "the outstanding balance in the account at the beginning of the billing cycle," is compatible with the requirements of §408.290-2(1) which calls for disclosure of "the total unpaid balance under the retail charge agreement at the beginning and end of the period."

7) Disclosure of the federally required term "finance charge" is not always consistent with the state requirement of §408.290-2 (4) for disclosure of "the amount of the time charge."

8) In small loan transactions, disclosure of the federally prescribed term "amount financed" as required by §226.8(d)(1) is not always consistent with the requirement of §408.130-1(5) which calls for "the principal amount of the loan, excluding interest."

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Roger C. Bern.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Craft

September 17, 1969

OPINION LETTER NO. 272

Honorable C. W. Culley
Commissioner of Finance
Department of Business
and Administration
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Culley:

This official opinion is in response to your request for a ruling upon the construction of §362.107, RSMo 1959 relating to separate banking facilities. Your inquiry reads as follows:

"Does the use of the word 'and' as quoted above mean that such facility must be so constructed as to permit walk-up service at a teller's window and also be so situated that customers may engage in the permitted banking transactions while in their automobile at drive-in teller's windows; . . ."

Although you refer in your letter to other questions which have arisen, I understand from our conference that your request for an opinion is limited to the question quoted above.

Section 362.107 provides in part:

"1. Purpose of the section. It is in the public interest that banking institutions be permitted to provide convenient banking service for the large proportion of people who must come to their banks by automobile. In many communities banking institutions are so located as to prevent the establishment of convenient facilities for automobile banking at locations attached to or immediately adjacent to their banking house. It is therefore in the interest of all the general

Honorable C. W. Culley

public that banking institutions be permitted to provide automobile banking service at one conveniently located facility, separate and apart from its banking house.

"2. (1) Anything in sections 362.105 or 363.170, RSMo, or in any other law of this state to the contrary notwithstanding, every bank and every trust company organized under the laws of this state which has the corporate power to receive deposits shall have the right to, and may, upon compliance with this section, maintain and operate separate and apart from its banking house one facility for drive-in and walk-up service, whereat checks may be paid, deposits received, deposits withdrawn, and change made only."

This section must be read in conjunction with §362.105, RSMo 1959 (1967 Supp.) which sets forth the powers and authority of banks and trust companies. This section provides:

"1. Every bank and trust company created under the laws under this state may:

"(1) . . . provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;"

It is apparent from these two sections that the general assembly has not repealed the prohibition contained in §362.107 against branch banking. Rather, it has made clear in §362.107(1) that the purpose of this section is to allow banking institutions to provide a facility which is designed for the convenience for those persons who wish to utilize the facilities of a banking institution by driving to the institution in their automobile. Consistent with this purpose, § 362.107(2) allows the banking institutions governed by this section to:

". . . maintain and operate separate and apart from its banking house one facility for drive-in and walk-up service, . . ."

By §362.107(3) any bank or trust company which desires to operate a facility pursuant to §362.107 must apply to the Commissioner of Finance for authority to maintain and operate such a facility.

Honorable C. W. Culley

It seems apparent from an examination of these two sections that a banking institution although not permitted to establish a branch bank, may establish a facility which is designed primarily for the convenience of the automobile driving public. The phrase "one facility for drive-in and walk-up service" should be interpreted consistent with the basic purpose of the act. Therefore, the Act requires that the facility must be primarily designed to serve those persons who come to the bank by automobile. The use of the phrase "walk-up" makes clear that the banking institution need not refuse to provide the services outlined in §362.107 merely because a prospective customer has left his automobile and walked to the bank.

The use of the word "and" in the phrase "drive-in and walk-up service" means that the commissioner may approve a facility which has either "drive-in" service or "walk-up" service so long as the facility is designed for the automobile driving public. Although the facility must be constructed in such a way as to serve the automobile driving public, it is not likely that the legislature intended to rigidly control the type of facility to be constructed. If a bank offers only a walk-up service, it is merely using a portion rather than all of the authority granted. Where a facility serves the automobile driving public by offering convenient parking and immediate access to a public way, the fact that the facility does not have a drive-in window would not require the commissioner to deny the application.

Therefore, it is the opinion of this office that the word "and" means and/or and the commissioner may approve a facility which has either drive-in service or walk-up service or both.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ARREST:
HIGHWAY PATROL:
MOTOR VEHICLES:

Members of the Missouri State Highway Patrol, with the exception of the director of radio and radio personnel, are authorized by Sections 43.195 and 564.443, RSMo Supp. 1967, to arrest without a warrant for a misdemeanor not committed in their presence, upon reasonable grounds, for the offenses mentioned in these statutes.

The one and one-half hour limitation imposed by Section 564.443, RSMo Supp. 1967, does apply to arrests for violations of Section 564.440, RSMo Supp. 1967 (driving while intoxicated) but does not apply to arrests for all other motor vehicle law violations under Section 43.195, RSMo Supp. 1967.

OPINION NO. 273

June 26, 1969

Honorable Thomas I. Osborne
Prosecuting Attorney
Audrain County
Mexico, Missouri 65265



Dear Mr. Osborne:

This is in reply to your request for an official opinion of this office concerning the two following related question, the first reading as follows:

"Can a Missouri State Highway Patrolman arrest without warrant, for a traffic violation committed on the public highways, such as speeding, when the offense was not committed in the patrolman's presence, but was reported to him by a private citizen at a later time and in such detail and manner that the patrolman did have reasonable grounds to believe that an offense had in fact been committed?"

The general power of arrest of a highway patrolman is granted by Section 43.190, RSMo 1959, which reads as follows:

"The members of the patrol, with the exception of the director of radio and radio personnel, are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers

Honorable Thomas I. Osborne

except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of this state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

Thus, a highway patrolman has the same powers generally exercised by peace officers in Missouri. The general rule in Missouri concerning arrest is that where a felony has been committed a peace officer has the right without a warrant to arrest upon information or reasonable ground to believe that the person arrested has committed a crime. *State v. Gartland*, Mo., 263 S.W. 165. A peace officer has no authority at common law to arrest without a warrant for a misdemeanor unless committed in the officer's presence. *Gartland*, l.c. 169. However, a peace officer may be authorized by statute to arrest without a warrant for a misdemeanor not committed in his presence. *Gartland*, l.c. 169.

It is our opinion that Sections 43.195 and 564.443, RSMo Supp. 1967, authorize members of the highway patrol to arrest without a warrant for a misdemeanor not committed in their presence upon reasonable grounds, for the offenses mentioned in these statutes.

Section 43.195 reads as follows:

"Any member of the Missouri state highway patrol may arrest on view, and without a warrant, any person he sees violating or whom he has reasonable grounds to believe has violated any law of this state relating to the operation of motor vehicles."

Section 564.443 reads as follows:

"An arrest without a warrant by a peace officer including a uniformed member of the state highway patrol, for a violation of section 564.440

Honorable Thomas I. Osborne

is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer; provided, however, that any such arrest without warrant must be made within one and one-half hours after such claimed violation occurred."

Section 564.440, RSMo Supp. 1967, reads as follows:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations thereof, and, on conviction thereof, be punished as follows:

"(1) For the first offense, by a fine of not less than one hundred dollars or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment;

"(2) For the second offense, by confinement in the county jail for a term of not less than fifteen days and not exceeding one year;

"(3) For the third and subsequent offenses, by confinement in the county jail for a term of not less than ninety days and not more than one year or by imprisonment by the department of corrections for a term of not less than two years and not exceeding five years.

"Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury, prior to the submission of the case to the jury, and the court shall enter its findings thereon."

Your second question relates to Section 564.443 and reads as follows:

"Also Section 564.443 makes mention of arrest by a patrolman without a warrant for driving while intoxicated, if done within an hour and

Honorable Thomas I. Osborne

a half of the offense. This might well not be a limitation upon the construction of section 43.195, since 564.443 was enacted in 1963, and section 43.195 was enacted in 1965."

We understand the question to be whether the one and one-half hour limitation applies to both sections, or to neither section, or to either of the two.

It is our opinion that the one and one-half hour limitation does apply to Section 564.443 but does not apply to Section 43.195. This is because Section 564.443 is specific and only applies to violations of Section 564.440 (driving while intoxicated) while Section 43.195 applies to any violation relating to the operation of motor vehicles. Therefore, the rule of statutory construction that a special statute on the same subject controls regardless of the time when a general statute was enacted applies here. *United States v. Hess*, 71 F.2d 78; *State ex rel. Monier v. Crawford*, 303 Mo. 6521, 262 S.W. 341. Accordingly, the one and one-half hour limitation applies to arrests for driving while intoxicated but does not apply to arrests for all other motor vehicle law violations.

CONCLUSION

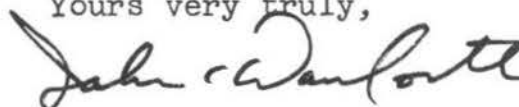
It is the opinion of this office that:

1. Members of the Missouri State Highway Patrol, with the exception of the director of radio and radio personnel, are authorized by Sections 43.195 and 564.443, RSMo Supp. 1967, to arrest without a warrant for a misdemeanor not committed in their presence, upon reasonable grounds, for the offenses mentioned in these statutes.

2. The one and one-half hour limitation imposed by Section 564.443, RSMo Supp. 1967, does apply to arrests for violations of Section 564.440, RSMo Supp. 1967 (driving while intoxicated) but does not apply to arrests for all other motor vehicle law violations under Section 43.195, RSMo Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

August 22, 1969

OPINION LETTER NO. 274

Mr. Howard L. McFadden
General Counsel
Department of Corrections
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. McFadden:

This is in response to your request for an official opinion from this office construing the extradition statutes of Missouri with respect to the interstate transfer of convicts for trial pursuant to an executive agreement. In your letter, you indicated that your request revolved around the following facts:

"The District Court of Washington County, Nebraska, has issued an order to the Superintendent of the Training Center for Men at Moberly to render up an inmate of that institution for trial in Nebraska, stating that the inmate shall be returned to the Training Center on completion of the trial;

"Authorities at California's Folsom Prison are holding Michael Novogradac to serve California sentences. He is an escapee from the Training Center for Men at Moberly and is wanted here both for the purpose of continuing his unfinished sentences and prosecution for the escape. Apparently, the California authorities under a California Supreme Court ruling (in re Stoliker, 49 Cal. 2d 75) are required to make such individuals available for trial and concurrent service of sentences in other states. They are prepared to release the man to the State of Missouri on the condition that he be returned to them if his

Mr. Howard L. McFadden

sentences here expire prior to the termination of his California sentences."

With respect to the above facts, you ask the following questions:

"Does section 548.051 RSMo. 1959 apply in either of these cases? (assuming that the State of Nebraska makes a proper demand through its Governor on the Governor of Missouri)

"If Novogradac is at any time to be returned to the State of California, would this have to be accomplished on an extradition warrant of our Governor? In that case, would the subject be entitled to invoke the provisions of section 548.101 RSMo. 1959?

"Would Missouri correctional authorities be subject to the penalties set out in section 548.111 RSMo. 1959 if they were to deliver Novogradac into the hands of the California authorities on the termination of his time without affording him the rights under 548.101 RSMo. 1959?"

In another letter, you raised the following additional questions:

"1. If Novogradac is entitled to a habeas corpus hearing before his return to the California authorities under Section 548.101, RSMo 1959, could he effectively raise the point that he is not a fugitive in that he was transported involuntarily from California to Missouri and, therefore, is not extraditable back to California?

"2. If Missouri, pursuant to an executive agreement, transports a prisoner to another state for trial before completion of his Missouri sentence, can this prisoner later fight return to the State of Missouri upon the grounds that he was not a fugitive in that he left under legal compulsion and is, therefore, not subject to extradition?"

Section 548.051, subsection 1, RSMo 1959, provides:

"1. When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under

Mr. Howard L. McFadden

criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated."

It is clear then that under the terms of this statute Michael Novogradac can be extradited from California for trial in this state under the terms and conditions set forth therein.

Also, it is our view that Section 548.051, subsection 1, authorizes the return of Novogradac to California on termination of prosecution in this state pursuant to an executive agreement without the formality of a demand from the Governor of California and the issuance of a governor's warrant in response thereto. This being so, the provisions of Section 548.010 are not applicable. Section 548.101 only applies in those instances where a person is to be delivered to an agent of a demanding state under the governor's warrant of arrest issued pursuant to Section 548.071, RSMo 1959. In adopting this view, we note with approval the following language from the case of Walsh v. State ex rel. Eyman, 450 P.2d 392, 396 (Ariz. 1969):

"...The executive agreement between the Governors of Arizona and California was a part of the original extradition proceedings and petitioners return to Arizona pursuant to that agreement made it unnecessary to initiate new proceedings in California for purposes of returning petitioners to Arizona. Any objections to the condition in the agreement for the return of petitioners to Arizona could have been raised in the original extradition proceedings in Arizona, and it would unnecessarily encumber the extradition process to require an additional hearing in California to present a second opportunity to test the validity of the condition for petitioners return."

With respect to the other fact situation mentioned in your opinion request, it is our opinion that the Governors of Nebraska and Missouri could enter into an executive agreement whereby an inmate of the Training Center for Men at Moberly could be returned to Nebraska for trial upon the condition that he be returned to this state at the expense of Nebraska as soon as the prosecution in Nebraska was terminated. Section 29-733, Revised Statutes of Nebraska 1943

Mr. Howard L. McFadden

is identical to our Section 548.051 and therefore authorizes the chief executive of the State of Nebraska to enter into executive agreements of this type. However, before reaching an executive agreement, the Governor of Nebraska must make a formal request for the extradition of the convict involved. The convict can be released to the Nebraska authorities only upon the governor's warrant of arrest issued pursuant to Section 548.071 and only after the convict has been accorded the opportunity to test the legality of the governor's warrant of arrest pursuant to Section 548.101. See *People ex rel. Lehman v. Frye*, 220 N.E.2d 235, 236-237 (Ill. 1966) wherein the Illinois Supreme Court held that a prisoner was entitled to a habeas corpus hearing before he could be taken from Illinois to Iowa for trial pursuant to an executive agreement.

Since it is our view that prisoners being returned to the state where they were initially imprisoned pursuant to an executive agreement do not come within the provisions of Section 548.101, RSMo or Section 29-738, Revised Statutes of Nebraska which is identical to Section 548.101, RSMo, it will not be necessary to discuss the questions raised in your subsequent letter.

Yours very truly,

JOHN C. DANFORTH
Attorney General

FILED
275

July 1, 1969

Opinion Letter No. 275
Answered by L. J. Gardner

Honorable Earl L. Schlef
State Representative
1672 Maldon Lane
Dellwood, Missouri 63136

Dear Representative Schlef:

This is in answer to your question whether an alderman of a fourth class city is entitled to any increase in pay during his term of office.

Section 79.270, RSMo, is as follows:

"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 79.270 may be said to implement Article VII, Section 13 of the Missouri Constitution, which reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Very truly yours,

JOHN C. DANFORTH
Attorney General

June 5, 1969



OPINION LETTER NO. 277

Honorable Max B. Benne
Prosecuting Attorney
Holt County Courthouse
Oregon, Missouri 64473

Dear Mr. Benne:

This is in response to your request for an opinion from this office concerning the lawfulness of dumping trash on the levees of levee and drainage districts. Your immediate question was whether Section 564.480, RSMo Supp. 1967, applies. Section 564.480, subsection 1, provides:

"1. No person shall throw or place, or cause to be thrown or placed, any glass, glass bottles, wire, nails, tacks, hedge, cans, garbage, trash, refuse, or rubbish of any kind, nature, or description on the right of way of any public road or state highway or on the navigable waters of this state or on the banks of any navigable stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof, or any political subdivision thereof." (Emphasis added)

It is our opinion that a levee or drainage district is a political subdivision within the meaning of this section. See Opinion No. 15, issued November 22, 1955, to the Honorable L.C. Carpenter and Opinion No. 318, issued August 1, 1968, to the Honorable Bernard W. Gorman holding that levee and drainage districts are political subdivisions for the purpose of entering into agreements with levee districts from other states and authorized agencies of the United States (copies enclosed).

Honorable Max B. Benne

Also note Article X, Section 15, Constitution of Missouri 1945, which states that levee and drainage districts are political subdivisions for the purpose of taxing. Therefore, it is our opinion that Section 564.480 applies to the dumping of trash on lands or waters owned, operated or leased by levee or drainage districts.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Encs: Opinion No. 15
Carpenter, 11/22/55

Opinion No. 318
Gorman, 8/1/68

STATE AUDITOR:
STATE TREASURER:
DEPARTMENT OF REVENUE:

The State Auditor is required under law to audit the Office of the State Treasurer at least once annually and is required to examine and post-audit the Department of Revenue not less than once every two years.

OPINION NO. 279

June 26, 1969

Honorable Frank Bild
State Representative
47th District
Room 2031
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bild:

This official opinion is issued in response to the request contained in your recent letter.

The question presented is:

How often is the State Auditor required, under law, to audit the Department of Revenue and the Office of the State Treasurer?

Article IV, Section 13, of the Constitution of Missouri provides that the State Auditor:

"* * * Shall * * * post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly.* * *"

The constitutional language has been incorporated in the statute. Section 29.200, RSMo Supp. 1967, states:

"The state auditor shall post-audit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and post-audit the accounts of all appointive officers of the state and of institutions supported in whole

Honorable Frank Bild

or in part by the state. He shall audit any executive department or agency of the state upon request of the governor."

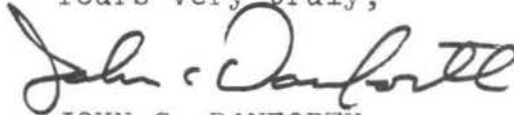
The constitutional provision and the statute refer to a "post-audit" of all "state agencies" and an "audit" of the "treasury" and each is considered separately with respect to the frequency of attention. Both the Department of Revenue and the Treasury are "state agencies" and the fact the framers of the constitution and the legislators chose to expressly provide for an audit of the Treasury annually, makes it clear that special treatment of this agency was intended. This view is supported further by the language in the statute requiring an examination and post-audit of appointive officers of the state once every two years. By virtue of this provision, the frequency of the post-audit of state agencies is fixed at not less than two years. Both the Director of Revenue and the Collector of Revenue are appointive officers and an examination of their accounts is required accordingly.

CONCLUSION

It is the opinion of this office that the State Auditor is required under law to audit the Office of the State Treasurer at least once annually and is required to examine and post-audit the Department of Revenue not less than once every two years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,



JOHN C. DANFORTH
Attorney General

SOIL AND WATER:
CONSERVATION:
DISTRICTS:
WATERSHED PROTECTION
AND FLOOD PREVENTION
SUBDISTRICTS:
DISESTABLISHMENT:

Section 278.290, RSMo Supp. 1967, which requires a waiting period of more than five years for disestablishment of Watershed Protection and Flood Prevention Subdistricts has no application to the disestablishment of Soil and Water Conservation Districts; disestablishment of such districts is governed solely by Section 278.150, RSMo Supp. 1967, which permits disestablishment at any time.

OPINION NO. 281

July 3, 1969

Honorable Winston V. Buford
Prosecuting Attorney
Shannon County
Eminence, Missouri 65466



Dear Mr. Buford:

This opinion is in response to your letter of recent date in which you request an official opinion from this office which request reads in part as follows:

"Section 278.150 clearly says that at any time twenty-five land representatives from each township may seek to disestablish a district. Section 278.290 seemingly is in contradiction in that there is a five year period imposed before disestablishment is allowed.

* * * * *

"I would like to have your opinion as to whether or not under Section 278.150 permits an attempt at disestablishment for a district formed under section 278 in the year 1966."

Section 278.060, RSMo Supp. 1967, provides:

Sections 278.060 to 278.155 may be known and cited as "The Soil and Water Conservation Districts Law."

The legislative purpose for encouraging the voluntary establishment of Soil and Water Conservation Districts in counties and townships of the State is "the saving of Missouri soil and water." Section 278.080, RSMo Supp. 1967. The Legislature in Subsection 1 of Section 278.150, RSMo Supp. 1967, provided a means for the disestablishment of the voluntarily established soil and water conservation districts.

Honorable Winston V. Buford

Such subsection provides as follows:

"1. The state soil and water districts commission upon receiving at anytime a petition for the disestablishment of any soil and water district, said petition being signed by not less than twenty-five land representatives in each township within the area covered by the petition, shall presently call for and conduct within that district a referendum upon the disestablishment of that district; and if a majority of the land representatives voting in this referendum do vote in favor of the disestablishment, the soil and water commission shall declare that district may not thereafter enter into any contracts or agreements on behalf of that district." (emphasis supplied).

Pursuant to Sections 278.160 through 278.300, RSMo Supp. 1967, the legislature provided for the establishment of Soil and Water conservation subdistricts.

The legislative purposes for permitting the establishment of subdistricts are set forth in Section 278.160

Such section provides as follows:

"Subdistricts of a soil and water conservation district may be formed as hereinafter provided for the purpose of carrying out watershed protection and flood prevention programs "for the prevention of floodwater and sediment damage and for furthering the conservation, development, utilization and disposal of water, and for increasing recreation, the supply of water, industrial development and agricultural water management, including fish and wildlife and recreational development."

Until 1967 the Legislature provided no procedure for the disestablishment of a subdistrict. In 1963 this office was asked to give an opinion whether the disestablishment provisions of Section 278.150, RSMo 1959, applied to subdistricts. This office held that it did not because of the differences in purpose and operation of the districts and subdistricts. Missouri Attorney General Opinion No. 72, April 3, 1963, Esely. With this ruling it became clear that while soil and water conservation districts might be disestablished, there was no statutory means available for disestablishing Watershed Protection and Flood Prevention Subdistricts.

At its 1967 session the Legislature enacted Section 278.290, RSMo Supp. 1967, which provides in part as follows:

"1. After a subdistrict has been organized for more than five years and said subdistrict does not have any outstanding bonds, has not

constructed or contracted to construct any works of improvement, nor incurred any continuing obligations for maintenance and operation of any works of improvement or if any works of improvement have been constructed, if there are no bonds outstanding and an agency of United States government or the State of Missouri or a county or municipal corporation of this state has made arrangements satisfactory to the Secretary of Agriculture and the state soil and water districts commission to assume responsibility for operating and maintaining such improvement not less than fifty per cent of the land representatives of the subdistrict may petition the governing body of the subdistrict to call for and conduct a referendum upon the disestablishment of the subdistrict. If sixty-five per cent of the land representatives voting in referendum do vote in favor of the disestablishment of the subdistrict, the governing body shall declare the subdistrict to be disestablished; however, prior to any such declaration the governing body shall pay or make arrangements to pay outstanding indebtedness. The provisions of sections 278.190, 278.200 and 278.210 as to notice qualification of voters and manner of holding the referendum in organizing a subdistrict to the extent practicable shall apply to the referendum held under this section.

2. Following the entry in the official minutes of the board or boards of soil and water conservation district supervisors of the disestablishment of the subdistrict, the soil and water conservation district supervisors shall certify this fact on a separate form, authentic copies of which shall be recorded with the recorder of deeds of each county in which any portion of the subdistrict lies, and with the state soil and water districts commission.* * *"

It can be readily seen from their respective language that Section 278.150 is limited in its operation, as this office has previously ruled, to the disestablishment of Soil and Water Conservation Districts and that Section 278.290 is limited in its operation to the disestablishment of Watershed Protection and Flood Prevention subdistricts. This conclusion is bolstered by the fact that the Legislature added Section 278.290 subsequent to the ruling of this office that there was no procedure available for the disestablishment of subdistricts.

The question answered by this office in 1963, supra p. 2, is essentially the converse of that posed by the present request for opinion, i.e., whether a statute designed to provide a procedure for the disestablishment of subdistricts has application to the disestablishment of districts. Because, as our 1963 opinion noted, districts and subdistricts differ from each other in purpose and

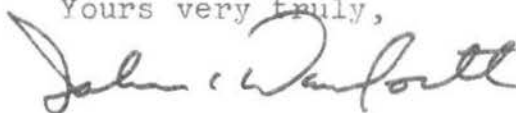
Honorable Winston V. Buford

operation and are not, therefore, interchangeable when disestablishment is considered and because of the clear limiting language of Section 278.290, this office holds that Section 278.290 does not in any way apply to the disestablishment of Soil and Water Conservation Districts and that pursuant to Section 278.150, proper land representatives may immediately attempt to have a Soil and Water Conservation District formed in 1966 disestablished.

CONCLUSION

Section 278.290, RSMo Supp. 1967, which requires a waiting period of more than five years for the disestablishment of a Watershed Protection and Flood Prevention Subdistrict has no application to the disestablishment of a Soil and Water Conservation District. Such district is governed solely by Section 278.150, RSMo Supp. 1967, which permits an immediate attempt to disestablish a district formed in 1966.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a continuous script.

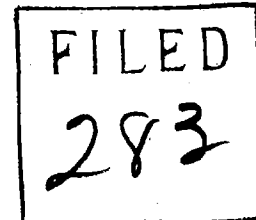
JOHN C. DANFORTH
Attorney General

CITIES, TOWNS & VILLAGES:
SEWERS:
MUNICIPAL CORPORATIONS:
TAXATION:

Third class city with existing sewer and disposal plant may establish general sewer system under 88.832 RSMo 1959, and the city council may levy the tax authorized thereunder. Such tax may be in excess of the constitutional limit for general municipal purposes.

OPINION NO. 283

August 28, 1969



Senator William J. Cason
Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Cason:

This is in response to your request for an opinion concerning the following matters:

1. Can a third class city with an existing sewer system and disposal plant establish a general sewer system under section 88.832 RSMo 1959 and levy a tax on the property in the city?
2. Can the tax imposed under section 88.832, RSMo 1959, be imposed either by the city council or by a vote of the people? If a vote of the people is permitted, does the imposition of the tax require a two-thirds majority?
3. May the tax under section 88.832, RSMo 1959, be larger than the existing limitation of \$1.00 per \$100.00 assessed valuation?

I

Section 88.832, RSMo 1959, gives third class cities authority to establish and operate a sewer system. The apparent purpose of this statute is to enable municipal corporations to deal most efficiently and effectively with their waste disposal problems. Such statutes are construed liberally and in conformity with the accomplishment of their purpose. In re East Bottoms Drainage and Levee District, 305 Mo. 577, 259 SW 89 (1924).

The provision authorizing the establishment of a general sewer system, section 88.832 RSMo 1959, provides:

"The governing body of any municipality shall have power to cause a general sewer system to be established, which shall be composed of four classes of sewers, to wit, public, district, joint district and private sewers. Public sewers shall be established, along the principal courses of drainage, at such time, to such extent, of such dimensions, and under such

Honorable William J. Cason

regulations as may be provided by ordinance. These may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient. The municipality may levy a tax on all property made taxable for state purposes over the whole municipality to pay for the constructing, reconstructing and repairing of the work, which tax shall be called "special public sewer tax" and shall be of the amount as may be required for the sewer provided by ordinance to be built; and the fund arising from the tax shall be appropriated solely to the constructing, reconstructing and repairing of the sewer.

Section 88.832 speaks of three things: a sewer system, which includes four classes of sewers, sewers and a tax. The section provides that "public" sewers are to be established, and may be either "entirely new throughout" or "extensions or branches of sewers already constructed." Hence, the system produced must of necessity include the sewer system to which such new public sewers are "extensions or branches." This means that a general, public sewer system which was in existence and operation before new public sewers are constructed under 88.832 may nevertheless be part of the "general sewer system" provided for in that section. There is no requirement that new construction be planned or in progress at the time the city provides for the adoption of a "general sewer system" as set forth in section 88.832. Nor would an exclusion of the cities with sewer systems already in existence but nevertheless in need of expansion from the provisions of this section be consistent with its purpose--to provide a more effective means for the financing of a highly efficient sewer system.

The tax, it is stated in Section 88.832 is to "pay for the constructing, reconstructing and repairing of the work," and is to be in only such amount as "may be required for the sewer provided by ordinance to be built." The funds from the tax may "be appropriated solely to the constructing, reconstructing and repairing of the sewer." The question is whether "the work," "the sewer provided by ordinance to be built" and "the sewer" refer only to the new portions of the system constructed after the establishment of the general sewer system under section 88.832, or to all portions of the sewer system, old and new. Clearly, the taxing provisions of section 88.832 were meant to make it easier for a city to finance the maintenance and extension of its sewer systems in order to provide the best kind of service to its inhabitants. It is consistent with this goal to interpret the language of section 88.832 to include repair and reconstruction of old sewers which are part of the general sewer system. As needs in cities grow for expanded sanitation services, new sewers may have to be built, and the expanding system may be constructed, reconstructed and repaired with tax funds collected under the authority of section 88.832, RSMo 1959.

II

Section 88.832 gives authority to the municipality's governing body to impose the tax provided for in this section. No vote of the people is called for and no authority is given the citizens of a municipality as such to impose the tax. Under section 1 of Article X of the Constitution the general assembly may delegate the power to tax for certain purposes to "counties and other political

Honorable William J. Cason

subdivisions." The term "political subdivision" is defined in Section 15 of Article X as including "townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi corporation having the power to tax." The delegation to such political subdivision must be construed according to its terms, and in this case, the delegation is specifically to the government of the municipality affected. Hence, only the governing body may impose the tax under Section 88.832.

III

Section 11 of Article X of the Constitution of Missouri provides that the tax imposed on property by municipalities for general municipal purposes shall not without a vote by the electors exceed \$1.00 per \$100 valuation provided that municipalities when authorized by law and within the limitation fixed by law may levy a rate of taxation in excess of the rates so limited for libraries, hospitals, public health, recreation grounds and museum purposes.

Section 94.070 RSMo provides in part as follows:

"In addition to the levy aforesaid for general municipal purposes, all cities of the third class are hereby authorized to levy annually not to exceed the following rates of taxation on all property subject to its taxing power for the following special purposes:

(2) For hospitals, public health, and museum purposes twenty cents on the one hundred dollars assessed valuation; and * * *

Construction, reconstruction and repairing of sewers clearly constitutes a public health service.

Under provisions of Section 94.070, therefore, a tax not to exceed 20¢ on the \$100 valuation may be levied in addition to the \$1.00 tax levy for general municipal purposes the proceeds to be used for the reconstruction and repair of public sewers as provided in section 88.832 RSMo.

CONCLUSION

It is the opinion of this office that:

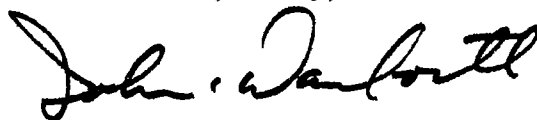
1. A third class city with an existing sewer system and disposal plant in operation may establish a general sewer system under section 88.832 RSMo 1959, and levy a tax on the taxable property in the city under that section.

2. The tax under section 88.832 may be imposed only by the city's governing body.

Honorable William J. Cason

3. A tax levy not to exceed 20¢ on the \$100 valuation may be levied by a third class city in addition to the \$1.00 tax levy for general municipal purposes the proceeds to be used for the construction, reconstruction and repair of public sewers as provided in section 88.832 RSMo.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" following in a similar style.

JOHN C. DANFORTH
Attorney General

August 13, 1969

OPINION LETTER NO. 285

Answered by L. J. Gardner

Honorable Harold J. Esser
State Representative - District 18
3 W. Glen Arbor Road
Kansas City, Missouri 64114

Dear Mr. Esser:

This is in reply to your question whether a meat retailer who purchases federally inspected meats which he cuts up and sells to his customers is subject to the provisions of the Meat Inspection Law because frozen food lockers are located on the premises.

The law with respect to the regulation of locker plants is set forth in Sections 196.450 to 196.515, RSMo. This law requires the operator of a locker plant to secure a license from the Department of Agriculture and it requires the department to inspect all locker plants licensed under Section 196.450 to 196.515 at least once each six months and may make such additional inspections as the department deems necessary.

The Meat Inspection Law is set forth in Sections 265.300 to 265.470, RSMo Supp. 1967. Section 265.320 provides:

"The commissioner shall exempt from the provisions of sections 265.300 to 265.470:

* * * * *

"(c) Retail dealers, with respect to meat and poultry which has been inspected federally or by other approved inspection, sold directly to consumers in individual retail stores, if the processing by the dealer is limited to the cutting up of meat or poultry on his premises to supply his own customers;"

Honorable Harold J. Esser -

If the retailer to whom you refer meets the qualifications of this section, he is in a position to ask the Commissioner of Agriculture to exempt him from the provisions of the Meat Inspection Law. As a preliminary step in that direction you may wish to suggest that he contact Dr. Harold B. Wright, Supervising Veterinarian, 814 Sunset, Liberty, Missouri. Dr. Wright's telephone number is 816-TH7-4293.

Yours very truly,

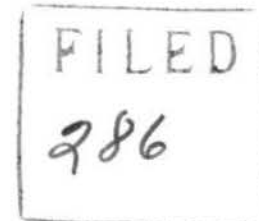
JOHN C. DANFORTH
Attorney General

VOTING: In a county which has provided for voter
ELECTIONS: registration, under the provisions of
ELECTION JUDGES: Chapter 114, RSMo, "The Local Option
Registration Law": (1) That pursuant to
Section 114.220(3), RSMo Supp. 1967, a person registered in a
precinct in which he offers to vote, may not be challenged on
the day of election solely on the basis that his residency is
actually in another precinct; (2) It is further the conclusion
of this office that the requisites to registration set out in
Section 114.050, RSMo 1959, except those of precinct residency,
may be inquired into by challenge on the day of election.

OPINION NO. 286

October 23, 1969

Honorable Roderic Ashby
Prosecuting Attorney
Mississippi County Courthouse
Charleston, Missouri 63834



Dear Mr. Ashby:

This is in reply to your request for an opinion asking what authority election judges have pursuant to Section 114.220, RSMo Supp. 1967, to deny a voter the right to vote in a precinct when such voter is registered in such precinct in a county which has adopted registration under provisions of Chapter 114, RSMo, the "local option" registration law. In effect, you ask whether the election judges can determine if a person is not qualified to vote if said person's name appears on the registration books of the precinct where he offers to vote.

As you have noted, the pertinent section involved here is Section 114.220(3), RSMo Supp. 1967, which states as follows:

"3. Any registered voter, when he offers to vote, may be challenged by any registered voter of the election precinct where he offers to vote; except, that he may not be challenged solely on the basis of registration if he is registered in the precinct in which he offers to vote. The judges of election shall try and determine, in a summary manner before the polls close, the qualifications of the challenged persons. Upon proof of the disqualifications of the

Honorable Roderic Ashby

person challenged, the judges shall reject his vote and state his disqualifications and the names of the witnesses upon whose testimony his vote was rejected opposite his name on the registration record. No person's vote may be rejected except upon the testimony of two credible witnesses and until the challenging person shall swear before the judges of election at the time of challenging that to the best of his knowledge and belief the person challenged is not a qualified voter and the reasons that disqualify him. The rejected ballot shall be preserved and returned with the books and other ballots in a separate envelope marked 'rejected ballots'."

As can be noted, a person offering to vote may have his right to vote challenged by any registered voter of the election precinct where the vote is offered. A person's vote is not to be rejected, however, until the challenging person shall swear before the judges of the election that to the best of his knowledge and belief the person challenged is not a qualified voter and states the basis for disqualification. Additionally, a person's vote may not be rejected by the judges except upon the testimony of two credible witnesses.

If a basis for disqualification is stated and sworn to, it then becomes incumbent upon the judges of election to try and determine in a summary manner before the polls close the qualifications of the challenged person.

Specifically, you inquire as to the meaning to be ascribed to the exception clause of Section 114.220(3), which states:

" * * * except that he may not be challenged solely on the basis of registration if he is registered in the precinct in which he offers to vote."

It is the view of this office that the meaning to be ascribed to this provision is that a person offering to vote in a precinct in which he is registered may not on the day of election be challenged solely on the basis that his actual residence is not in such precinct, but is in some other precinct. Thus, it would appear that the intention of the legislature was to withdraw as a basis for challenge on election day the fact that a person duly registered in the precinct does not, in fact, reside in said precinct. As will be noted in (1) and (2) of Section 114.220, the procedure is

Honorable Roderic Ashby

set out by which precinct residency may be tested, to wit: In (1) by written challenge filed with the county clerk at least 21 days before the election; In (2) by challenge filed with the Circuit Court between the 10th and 20th day preceding any election.

It would appear, however, that the legislature did not intend to remove all bases of challenge on the day of election; and therefore, it is our conclusion that any of the requisite qualifications to registration set out in Section 114.050, RSMo 1959, except that of precinct residency, may validly be inquired into by a challenger on the day of election.

CONCLUSION

It is the conclusion of this office that in a county which has provided for voter registration under the provisions of Chapter 114, RSMo, the "Local Option Registration Law":

(1) That pursuant to Section 114.220(3), RSMo Supp. 1967, a person registered in a precinct in which he offers to vote, may not be challenged on the day of election solely on the basis that his residency is actually in another precinct;

(2) It is further the conclusion of this office that the requisites to registration set out in Section 114.050, RSMo 1959, except those of precinct residency, may be inquired into by challenge on the day of election.

The foregoing opinion, which I hereby approve, has been prepared by my assistant, Kenneth M. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ROADS AND BRIDGES:
ROAD DISTRICTS:
SPECIAL ROAD DISTRICTS:

A commissioner of a special road district may not be employed as a laborer for the road district.

OPINION NO. 287

October 7, 1969

Honorable William S. Brandom
Prosecuting Attorney
Clay County
Liberty, Missouri 64068



Dear Mr. Brandom:

This is in answer to your request for an official opinion of this office concerning the question whether a commissioner of a special road district may be employed as a laborer for the road district.

The Missouri Supreme Court has elaborated on the compatibility of the same person holding two different offices simultaneously. In State ex rel. Walker v. Bus, 135 Mo. 325, 36 S. W. 636, at 639, the Court states the general rule:

" * * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two, - - some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control or assist him. * * * " (Emphasis added)

You informed us that the special road district is one provided for in §§ 233.170 through 233.315, RSMo 1959. §233.180, RSMo 1959 provides for three commissioners to be appointed by the county court. §233.190, RSMo 1959 sets out the powers and duties of the commissioners and reads in part as follows:

"2. Said commissioners shall have sole, exclu-

Honorable William S. Brandom

sive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease, or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."
(Emphasis added)

It is our opinion that the two positions are incompatible because a commissioner of a special road district clearly has supervision over a laborer of the district, in violation of the rule set out in the Walker case.

Furthermore, §233.270, RSMo 1959, which provides for contracts for improvement, specifically prohibits such employment in subsection 2 which reads as follows:

"2. Said commissioners may advertise for bids for such contract in any manner they may choose; and the contract shall in no case be let to any commissioner, nor shall any commissioner (sic), directly or indirectly, have any pecuniary interest therein other than the performance of his official duties as herein required."

CONCLUSION

It is the opinion of this office that a commissioner of a special road district may not be employed as a laborer for the road district.

The foregoing opinion, which I hereby approve, was prepared by my assistant Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

June 20, 1969

OPINION LETTER NO. 288



Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
Court House
Cape Girardeau, Missouri

Dear Mr. Seier:

This is in response to your request for an opinion from this office concerning the question as to whether a county must furnish office space for a private abstract company in the Office of the County Recorder of Deeds. Based upon your letter, it is our understanding that the County Recorder in your county has provided space in one corner of his office which is being used exclusively by a private abstract company. This space is adjacent to an area used by the general public to inspect any records in the Recorder's Office and contains approximately two desks with electric typewriters upon them. It is our understanding the county pays the utility bill for the use of these typewriters.

It is our opinion that a county officer cannot maintain floor space and equipment for use exclusively by a private company. Article VI, Section 23, Constitution of Missouri, 1945 provides:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Also, Article VI, Section 25, Constitution of Missouri, 1945 provides:

Honorable A. J. Seier

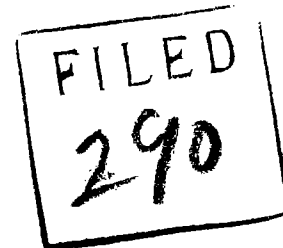
"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation . . ."

It is clear that the providing of office space, equipment, and/or utilities falls within the restrictions contained in these sections. By allowing the abstract company exclusive use of this area, the County Recorder is aiding a private company in the furtherance of its private business through the use of public finances and a public building. Such is contrary to the Constitution of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

June 27, 1969



OPINION LETTER NO. 290

Honorable Lawrence J. Lee
Senator, District Three
418 State Capitol
Jefferson City, Missouri 65101

Dear Senator Lee:

You have asked for my opinion as to the constitutionality of House Bill 608 of the 75th General Assembly and the Federal Gun Control Act of 1968.

The Federal Gun Control Act of 1968 (18 U.S.C.A., Sections 921-928) generally provides:

(1) for the licensing of, and record-keeping by, importers, manufacturers, dealers and collectors of firearms and ammunition moving in interstate commerce;

(2) for the prohibition on interstate transfers of firearms or ammunition other than between licensees;

(3) for the prohibition on interstate transportation of firearms other than by licensees;

(4) for the prohibition on transfers by licensees of firearms or ammunition to:

- a. Minors,
- b. Persons under indictment for, or convicted of, felonies,
- c. Fugitives from justice,
- d. Drug addicts,

Honorable Lawrence J. Lee

e. Mental defectives,

f. Persons disqualified by state law or local ordinance;

(5) for the regulation of intrastate sales of firearms by licensees to the extent that all but over-the-counter purchasers must submit a sworn statement of proper age, eligibility to make the purchase under state and local law, and name of the principal law enforcement officer in the purchaser's residence. Prior notice of the sale to such law enforcement officer is required;

(6) for the disability of indicted or convicted felons, fugitives from justice, drug addicts or mental defectives to ship in, or receive from, interstate commerce, firearms or ammunition;

(7) for a system of identification through serial numbers of all firearms subsequently manufactured or imported.

The Act's prohibition on interstate transfers to non-licensees and transportation by non-licensees is qualified by an exception permitting sales and deliveries of rifles and shotguns to non-licensed residents of any state contiguous to that of the licensee if the law of the contiguous state so permits and if the same procedures for intrastate, not over-the-counter sales, are observed. It is the obvious purpose of House Bill 608 to take advantage of this exception in the Federal law so as to permit non-licensed residents of the State of Missouri to purchase, in person or by mail, rifles and shotguns from neighboring states, and to permit non-licensed residents of neighboring states to make similar purchases in Missouri.

Pursuant to its powers to regulate commerce among the several states (Section 8, Article I, Constitution of the United States) the Federal Gun Control Act appears to be constitutional. One Federal Court has stated that Congress has the power to prohibit interstate transfer of firearms altogether so that permission of Congress to transfer firearms subject to well-defined regulation is valid Varitimos v. United States, 404 F.2d 1030 (1st Cir. 1968). I can conceive of no other constitutional objection to the Federal Gun Control Act of 1968 than that it constitutes an infringement on the "right of people to keep and bear arms" (Amendment II, Constitution of the United States). However, this provision of the Federal Constitution has been construed to mean only that each of the States has the right to keep and maintain a well-regulated militia and not as conferring an individual right to possess arms. Cases v. United States, 131 F.2d 916 (1st Cir. 1942); cert. den. 319 U.S. 770 (1943). Accordingly, I see no constitutional infirmity in the Federal Act.

Honorable Lawrence J. Lee

House Bill 608 in no way extends the scope of the Federal law, but merely permits residents of Missouri to do an act in a neighboring state, and neighboring state residents to do an act in Missouri, which might otherwise be prohibited by Federal law. Accordingly, I am of the opinion that House Bill 608 does not offend the provision in the Missouri Constitution,

"That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; . . ."
(Article I, Section 23, Constitution of Missouri, 1945)

In other words, the Federal Gun Control Act does not depend upon House Bill 608 to be effective in Missouri, and therefore possible limitations placed upon the Missouri legislature by the Missouri Constitution do not apply. The Federal law stands upon its own feet, and if valid under the Federal Constitution, which I believe it is, the Missouri Constitution will not render it invalid.

The states surrendered a portion of their sovereignty when they granted Congress power to regulate commerce (Parden v. Terminal Ry. of Alabama, 377 U.S. 184, 12 L.Ed.2d 233 (1964)).

"'. . . This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. . . ." (Gibbons v. Ogden, 9 Wheat 1, 196-197, 6 L.Ed. 23, 70 (1824)).

Therefore, it is my opinion that House Bill 608 and the Federal Gun Control Act of 1968 are constitutional.

Yours very truly,

JOHN C. DANFORTH
Attorney General

July 11, 1969



Opinion Letter No. 291
Answered by L. J. Gardner

Honorable Dexter D. Davis
Commissioner
Department of Agriculture
Jefferson Building
Jefferson City, Missouri 65101

Dear Commissioner Davis:

This is in reply to your question whether the Department of Agriculture may charge subscribers for the cost of publishing the Daily Market Summary, a bulletin which sets forth the market prices for livestock, poultry, eggs, meat and grain.

The legislature has authorized you to publish this bulletin in Section 261.030, RSMo, wherein it provided:

"* * * The commissioner of agriculture may
publish bulletins containing information
useful to the producer and consumer; * * *"

However, there is no statutory provision which allows you to make a charge for supplying copies of this bulletin. In the absence of such a statutory provision you are not empowered to require the persons who receive the bulletin to pay all or part of the cost of publishing it.

Enclosed please find a copy of Opinion No. 81 dated January 16, 1951, to the Honorable H. G. Shaffner, Commissioner of Finance, Department of Business and Administration, Jefferson City, Missouri, holding that in the absence of a statutory provision authorizing him to do so, the Commissioner does not have power to charge and collect

Honorable Dexter D. Davis -

a fee for the performance of official duties. Also enclosed is a copy of an opinion dated November 17, 1949, to Mrs. Lucile Gregory, Executive Secretary, State Board of Cosmetology, holding that a rule requiring payment of a fee for certification of certain records was beyond the powers granted to the Board by the legislature.

Yours very truly,

JOHN C. DANFORTH
Attorney General

enclosures:

Op. No. 81, Shaffner, 1-16-51
Opinion, Gregory, 11-17-49

USURY: It is the opinion of this office that the making
INTEREST: of a loan by requiring the execution of a note
to the principal of which is added simple interest
on the entire amount of the loan at the rate of five per cent per
annum for seven years, payable over a period of 84 months in equal
monthly installments and secured by a first deed of trust on real
estate constitutes usury in that the total interest payable on the
note evidencing the debt would exceed eight per cent per annum as
limited by Sections 408.030 and 408.050, RSMo.

September 11, 1969

OPINION NO. 292

Honorable Robert H. Branom
State Representative
35th District
7701 Forsyth, Suite 574
Clayton, Missouri 63105

Dear Representative Branom:

This is in response to your request for an opinion as to the
legality of five per cent add-on interest on a note secured by a
first deed of trust on real estate payable in equal installments
over 84 months.

We interpret the question to refer to a loan to a borrower
to whom a requested amount is advanced in money and the borrower
signs a note in an amount equal to the sum of the amount advanced
plus interest on the advanced amount equal to seven times the
interest for one year on the entire principal sum. That is, in
addition to the amount advanced there is included in the face
amount of the note simple interest on the amount advanced for a
period of seven years. The note is then made payable in 84 equal
installments with interest from maturity. For example, in a loan
of \$1,000.00 the annual interest on that sum would be \$50.00 and
since the loan is for 84 months (seven years) a sum equal to seven
times the \$50.00 is added onto the principal making the total face
value of the note \$1,350.00. This amount is payable under the
terms of the note in 84 equal monthly installments commencing the
month following the making of the loan and the face amount of the
note bears no interest until after maturity.

Your inquiry refers to Section 408.070 V.A.M.S. and 408.080
V.A.M.S. We believe that neither of these sections are applicable

Honorable Robert H. Branom

or relevant to the hypothetical situation proposed. Section 408.070, RSMo Supp. 1967, invalidates a lien on personal property where it secures a loan which is usurious. This section is not applicable to loans involving liens on real estate. Section 408.080 provides for the compounding of interest not oftener than once a year. This section also would be inapplicable because interest has been added to the principal amount of the loan and payments are being made monthly, thereby eliminating the payment of interest on interest.

Chapter 408 of the Revised Statutes of Missouri provides what may be charged as interest on loans not covered by other provisions of the law. The loan described in your questions is governed, we believe, by Sections 408.030 and 408.050, RSMo. These are the general sections prescribing permissible interest rates and the small loan provisions of Chapter 408 do not apply to the loan described because it involves a loan secured by real estate and is, therefore, specifically excluded by Section 408.100.

Section 408.030, RSMo provides as follows:

"The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due upon any contract."

Section 408.050, RSMo provides as follows:

"No person shall directly or indirectly take, for the use or loan of money or other commodity, above the rates of interest specified in sections 408.020 to 408.040, for the forbearance or use of one hundred dollars, or the value thereof, for one year, and so after those rates for a greater or less sum, or for a longer or shorter time, or according to those rates or proportions, for the loan of any money or other commodity. Any person who shall violate the foregoing prohibition of this section shall be subject to be sued, for any and all sums of money paid in excess of the principal and legal rate of interest of any loan, by the borrower, or in case of borrower's death, by the administrator or executor of his estate, and shall be adjudged to pay the costs of suit, including a reasonable attorney's fee to be determined by the court."

Honorable Robert H. Branom

This office is of the opinion that the loan proposed would be in violation of the maximum interest rates allowed by the above sections of the statutes and would constitute usury.

To illustrate that the loan would be in excess of eight per cent per annum, consider a proposed loan in which the borrower is to receive \$1,000.00 in money. The note would be executed in the face amount of \$1,350.00. The note provides for 84 equal monthly installments commencing one month after date in the sum of \$16.07+. The total interest paid over the period of seven years (84 months) is \$350.00.

Available amortization tables reveal that a loan of \$1,000.00 at eight per cent per annum, the maximum rate, payable over a period by 84 monthly installments requires a monthly payment of \$15.586 per month. Eighty-four of these payments would total \$1,309.224. Thus, the five per cent add-on exceeds by \$40.87- interest on the unpaid balance at the rate of eight per cent per annum.

It is believed that Sections 408.020 and 408.050 read together would prohibit the taking of interest for a loan in excess of eight per cent per annum on the unpaid balance. Section 408.050 is not entirely clear in its expression, but it must be interpreted to mean that \$8.00 is the amount permitted for the use of \$100.00 for one year and that the same rate is true whether the sum is more or less than \$100.00 and the time longer or shorter than one year.

There is a scarcity of cases defining the exact application of the sections of the statutes as pertains to installment loans. The subject is discussed in a Comment, by Gilbert B. Stephenson, in Volume 26, Missouri Law Review, Page 217, l.c. 228, as follows:

"Installment loans are typically those which are borrowed in a lump sum but are repaid by periodic installments over a stated length of time. Because of the complexities in figuring the amounts of interest that can be legally charged on a loan the principal of which is decreased by each installment paid, the installment loan transaction is often a source of illegal profits for the lenders. The device most often used by the lenders in gaining their illegal profits is that of charging maximum legal interest on the whole sum loaned until the last installment is to be paid. This interest is simply added to the principal debt and paid in proportion to the installment. For example, in Hanson v. Acceptance Fin. Co., the principal

Honorable Robert H. Branom

debt was \$1663.20, to be repaid in 18 monthly installments. The debt allegedly was to draw eight per cent interest but the lender included the sum of \$226.80 interest to be paid proportionately to the installments. This sum of interest was in excess of the amount which could have been charged had the transaction not been an installment loan. Thus, the borrower was paying interest at approximately twice the lawful rate. When such a provision is called to the attention of the court it is declared usurious."

In Annotation, "Taking or charging interest in advance as usury", 57 A.L.R.2d 630, 1.c. 666, it is stated:

"Where interest on installment repayment loans has been charged in advance by adding to the principal the amount of interest computed thereon for the entire term of the loan, and making the installments in such amount as to repay the entire sum thus derived, it has been usurious. This method of taking interest in advance has the same usurious result as the deduction of interest from the principal delivered, because it ignores the fact that the principal does not remain outstanding for the duration of the loan in the amount on which the interest was computed."

It is likewise stated in Corpus Juris Secundum that such a loan would constitute usury, 91 C.J.S., Usury, Section 29B, Page 605:

"Where the principal sum of a loan or debt is made payable in installments at specified intervals within the full period of the loan, but interest for the full period on the whole principal sum is agreed to be paid, or is taken or withheld by the lender in advance, or is included in the face amount of the note, the transaction is usurious, whether or not the rate of interest stipulated in the contract exceeds the maximum specified by law, if the sum so agreed to be paid or so deducted as interest is greater than interest at the lawful rate on the principal sum for the period for which it is actually lent. Similarly, where interest is calculated at the highest lawful rate for the full period of a loan, and the aggregate of the

Honorable Robert H. Branom

principal and the interest as so calculated is divided into a series of notes which mature at intervals within the full period, the transaction is usurious "

The Missouri courts have followed the above stated rules.

In VanDoeren vs. Pelt, 184 S.W.2d 744 (St.L.App., 1945) the Court of Appeals stated:

"That the loan in this case was tainted with usury there can be no question. The maker of the note was borrowing \$150 for fifty weeks. He did not get \$150, he got \$135. What was the \$15 deducted for? The evidence shows \$1.50 represented insurance premium, which was a proper deduction. The evidence shows \$1.50 was deducted for an investigation. This was a proper charge and authorized under subdivision 3 of Section 5421, R.S. 1939, Mo. R.S.A. (loan and investment companies), if there was proof to justify the charge. Missouri Discount Corp. v. Mitchell, 216 Mo. App. 100, 261 S.W. 743. Plaintiff's witness Van Doeren could not remember the details of the transaction and could not swear what was done by the company with reference to investigation. The most he would say was his conclusion that an investigation of defendants' credit standing was made because that was the usual practice. But even if it be conceded that the charge was a proper one, \$12 was deducted, which amounted to a year's interest at 8% on \$150 which had been loaned for only fifty weeks, two weeks short of a year; not only so, but payments were contracted for of \$3 each week throughout the term of fifty weeks. It is apparent without here making a computation that plaintiff was contracting for considerable in excess of 8% per annum interest, the legal rate."

In Hecker vs. Putney, 196 S.W.2d 442 (St.L.App., 1946) the plaintiff had borrowed and received \$560.00 and had signed notes totaling \$725.50 of which \$700.00 was stated as principal and \$25.50 the first year's interest at six per cent. Plaintiff signed twelve notes which fell due one on each month consecutively for one year. There the court held that this constituted and the evidence sustained a finding of usury and upon tender of the balance of the amount legally due the second mortgage on a real estate securing the notes was discharged and foreclosure was enjoined.

Honorable Robert H. Branom

The device of adding on interest on the full principal amount of the loan although it is repaid in installments over a period of time will, in our opinion, result in usury if the total interest paid over the period of the loan exceeds eight per cent per annum on the unpaid balance. To compute the actual interest charged in the loan suggested in your question would require 84 separate computations. However, the foregoing computations demonstrate that the transaction would provide for interest in excess of the legal rate as provided by the applicable sections of the statutes and therefore would constitute usury.

CONCLUSION

It is the opinion of this office that the making of a loan by requiring the execution of a note to the principal of which is added simple interest on the entire amount of the loan at the rate of five per cent per annum for seven years, payable over a period of 84 months in equal monthly installments and secured by a first deed of trust on real estate constitutes usury in that the total interest payable on the note evidencing the debt would exceed eight per cent per annum as limited by Sections 408.030 and 408.050, RSMo.

The foregoing opinion which I hereby approve was prepared by my Special Assistant Larry L. Zahnd.

Yours very truly,



JOHN C. DANFORTH
Attorney General

GOVERNOR:
EXECUTIVE DEPARTMENTS:
PUBLIC OFFICERS:

The Governor can designate a person to perform the duties of the office of the head of an executive department, such person not being

appointed to the office or claiming title to the office. Such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed.

OPINION NO. 293

June 25, 1969

Honorable Robert A. Young
State Senator, District 24
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Young:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"I would like to have an early opinion from your office on the following, which is set forth in Article IV, Section 17 of the Constitution of Missouri:

'The heads of all the executive departments shall be appointed by the governor, by and with the advice and consent of the senate.'

"I would like your opinion as to how long an executive department head can be appointed and serve as 'acting director'. I realize that the Governor can and must make appointments to executive departments while the Senate is not in session, but it is my impression that if an appointment is made while the Senate is in session it must be immediately submitted to the Senate for its advice and consent. If an appointment is made while the Senate is not in session, it is my opinion that the appointment should be submitted at the next regular or special session."

We understand the question under consideration relates to the situation where the Governor has designated or will designate a so called "acting director" to perform the duties of a department head

Honorable Robert A. Young

instead of appointing a person as director or head of one or several of the executive departments as such. In other words the Governor has not appointed a person as the head of the department as required by Section 17, Article IV, Constitution of Missouri, but has designated a person to perform the duties of such office. The question is whether such designations of "acting directors" are legal and whether such "acting directors" can perform the duties of the office, and as requested in your letter, how long such "acting directors" can serve.

Section 17, Article IV, Constitution of Missouri, which you have quoted in part, specifically empowers the Governor to appoint the heads of all executive departments, reading in part as follows:

" . . . The heads of all the executive departments shall be appointed by the governor, by and with the advice and consent of the senate.
 . . . "

The executive departments that are appointed by the Governor pursuant to Section 17, Article IV, are those designated in Section 12, Article IV, Constitution of Missouri, and are as follows:

" . . . a department of revenue, department of education, department of highways, department of conservation, department of agriculture and such additional departments, not exceeding five in number, as may hereafter be established by law. . . . "

Five additional departments have been established, being: Department of Public Health and Welfare, Department of Business and Administration, Department of Corrections, Department of Community Affairs, and Department of Labor and Industrial Relations.

Thus, the Governor has the exclusive power to appoint the heads of the executive departments listed above. See State ex rel. Harvey v. Wright, 251 Mo. 325, 158 S.W. 823. We understand your question to relate only to such departments. However, the Governor not only has the power to appoint such department heads, the Governor has the mandatory duty to make such appointments. The constitutional provision imposes the duty by providing that the appointments "shall" be made by the Governor. In the context of this constitutional provision the general rule of construction is that "shall" is mandatory. State v. Wurdeman, 295 Mo. 566, 246 S.W. 189.

Your letter refers to "appointments to executive departments while the Senate is not in session," suggesting that such "appointments" can be made but must then be submitted to the Senate for

Honorable Robert A. Young

confirmation at the next regular or general session. Your impression as to such "appointments" is correct and we have so held in Attorney General Opinion No. 24, November 10, 1942, Donnell (copy attached). However, such opinion only relates to appointments of directors or heads of the departments and does not deal with the question here of the legality of designating the so called "acting directors."

While the Governor has the duty to appoint department heads under the procedure set forth in Article IV, Section 17 of the Constitution of Missouri, his failure to make such appointments is not the ground for a mandamus action against him. State ex rel. Robb v. Stone, 120 Mo. 428, 25 S.W. 376, 23 L.R.A. 194, 41 Am. St. Rep. 705.

If the Governor fails to make appointments of department heads as required by Section 17, Article IV, it must be determined whether persons can be designated to carry out the functions of department heads in the absence of persons duly appointed. It is our view that any such authority is derived from the general constitutional provisions relating to the powers and duties of the Governor.

Section 1, Article IV, Constitution of Missouri, provides as follows:

"The supreme executive power shall be vested in a governor."

Section 2, Article IV, Constitution of Missouri, provides as follows:

"The governor shall take care that the laws are distributed and faithfully executed, and shall be a conservator of the peace throughout the state."

It is clear from these constitutional provisions that the Governor has the responsibility of seeing that the laws of the state are carried out and that the functions of the executive offices are performed. Thus, it is our opinion that these constitutional provisions empower and obligate the Governor to make certain that the functions of these ten executive departments are carried on so that a lapse in the operation of such departments does not occur.

Obviously, the Governor himself cannot perform all the actual duties or functions of the various offices. Therefore, it being necessary for these departments to continue to operate, the Governor may designate someone to run the department until such time as the Governor performs the duty imposed on him by Section 17, Article IV.

Honorable Robert A. Young

The designation of "acting director" under similar circumstances is recognized by the courts by the application of the doctrine of locum tenens.

Black's Law Dictionary defines locum tenens as:

"Holding the place. A deputy, substitute, lieutenant, or representative."

The leading case on the doctrine is *Fraser v. United States*, 16 Ct. Cl. 507, the court stating on page 514 not only the doctrine but the facts as well, saying:

"The Secretary did not intend to appoint the claimant to the office of Supervising Architect. The letter to him is not in the language of an appointment. It is addressed to him as 'superintendent of the construction of the new building for the Bureau of Engraving and Printing,' and directs him merely 'to take charge of the office and perform the duties of Supervising Architect during the suspension of Mr. Hill from duty.'

"That such was the clear understanding of all parties at the time is manifest from their acts. Mr. Hill's name continued to be borne on the pay-rolls from month to month as still in office, and his salary was regularly paid to him. Of this the Secretary must have been cognizant. The claimant not only knew it, but he assented to it and certified to its correctness.

"He did not then claim the title and the full enjoyment of the office. He invariably styled himself 'Acting Supervising Architect,' a form of expression in constant use and well understood in all the executive departments of the government as designating, not an appointed incumbent, but merely a locum-tenens who is performing the duties of an office to which he does not himself claim title." (emphasis supplied)

Thus, in *Fraser*, as here, there was no intention to make an appointment to the office but there was a designation of someone to perform the duties of the office. It was held that such person could legally perform such duties as locum tenens.

In *State ex rel. Gossett v. O'Grady*, 137 Neb. 824, 291 N.W. 497, the Supreme Court of Nebraska applied the doctrine as follows:

Honorable Robert A. Young

"Lloyd Kelly, the duly elected and qualified county attorney, was absent from the state of Nebraska from June 23 to July 4, 1936. Before leaving he requested William P. Mullen to take care of the duties of the county attorney's office, and Mullen expressly assented to such request. Attorney Mullen thereupon, after this authorization, without taking an oath or giving bond, prepared, signed, swore to and filed this information as Acting County Attorney in the district court for Hall county on June 27, 1936. The district court thereupon caused the record to be made as hereinbefore set forth. The word 'acting' in this connection has been employed to designate a locum tenens who is performing the duties of an office to which he does not himself claim title.

"The supreme court of Iowa in State Bank of Williams v. Gish, 167 Iowa 526, 149 N.W. 600, 601, in discussing the term 'acting officer', employed the following language:

'The phrase "acting officer" is used to designate, not an appointed incumbent, but merely a locum tenens, who is performing the duties of an office to which he himself does not claim title. 1 Am. & Eng. Enc. of Law, 577 (2d Ed.); 1 Cyc. 632. Both these authorities cite the same case (Fraser v. United States, 16 Ct.Cl. [507] 514).'"

For further discussion see State Bank of Williams v. Gish, 167 Iowa 526, 149 N.W. 600, and Maystrik v. City of New York, 165 Misc. 327, 300 N.Y.S. 479.

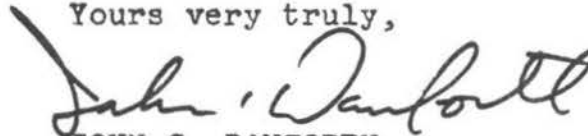
CONCLUSION

It is the opinion of this office that the Governor can designate a person to perform the duties of the office of the head of an executive department, such person not being appointed to the office or claiming title to the office. Such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed.

Honorable Robert A. Young

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 24
11-10-42, Donnell

STATE HIGHWAY COMMISSION:

Commission may establish position of Director, having general charge and supervision of state highway department, and may determine qualifications. Provisions of Section 226.040, RSMo 1959, relating to "chief engineer" are not effective to limit this authority.

OPINION NO. 294

July 11, 1969

Honorable William C. Phelps
State Representative
5016 Grand
Kansas City, Missouri 64112

Dear Representative Phelps:

This official opinion is issued pursuant to your request dated June 10, 1969, in which you state that:

" the Highway Commission of the State of Missouri has appointed an administrator whose duties will supersede certain of the duties of the chief engineer."

You then ask whether:

" the highway commission has authority under the constitution and statutes of the State of Missouri to delegate duties to a non-statutory employee which supersede the duties of the chief engineer. . . ."

Robert L. Hyder, Esq., Chief Counsel of the Highway Commission, has furnished us some additional information which bears on your inquiry. He advises us that the Commission by resolution has established the position of "Director" and has made an appointment effective July 1, 1969, at a salary of \$23,500 per year. The resolution specifies the duties of the director to be as follows:

"(The director) shall have general charge and supervision of the State Highway Department and shall perform such duties and have such authority as the commission may designate."

Section 226.040 RSMo provides that the State Highway Commission shall appoint a "chief engineer"

Honorable William C. Phelps

"...who is a resident of this state, and he shall have had executive or administrative experience for at least five years next prior to his appointment and he shall have had experience in highway work. Under the direction of the commission, the chief engineer shall have general supervision of the state-highway department, and shall perform such duties and have such authority as the commission may designate." (Emphasis supplied)

The duties of the chief engineer as set out in this statute are the same as those of the director as set out in the commission's resolution. The apparent differences are as follows: (1) The title of the position is different; (2) The statute prescribed detailed qualifications for the chief engineer, whereas the resolution is silent as to qualifications for the director; and (3) The salary of the chief engineer is established by Section 226.080, RSMo Supp. 1967, at \$22,500 maximum. The apparent conflict makes necessary an inquiry as to the authority of the Legislature with respect to employees of the State Highway Commission.

The Missouri State Highway Commission was first established as a constitutional agency by the Missouri Constitution of 1945, although amendments adopted prior to that time made reference to it. Article IV, Section 29 of the Constitution provides as follows:

"The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law, and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

The State Highway Commission, therefore, derives its basic authority from the constitution and not from the Legislature. In two instances (construction and reconstruction, and limited access),

Honorable William C. Phelps

its authority is subject to "limitations and conditions imposed by law, " but the balance of its authority is not subject to any such expressed limitation. The Commission, in contrast to some agencies and departments of the state government, is specifically constituted as a bipartisan body.

The Commission, therefore, has a constitutional responsibility. The determination of lines of authority and the selection of employees is basic to a body having such authority. The constitution is silent as to the organization of the commission and as to its staffing, except for the provision against discrimination on account of political affiliation in the selection and removal of employees. The clear intentment, then, is that the Commission is to have the authority to establish positions, to prescribe the duties of the employees in those positions, and to determine the qualifications for the employees in the positions so established.

The Legislature clearly would be exercising control over the commission if it could prescribe the positions to be filled and the qualifications of the employees eligible for these positions. If the Legislature has such a power it could deny the commission the services of the person considered to be best qualified by those having the responsibility for the highways. This control is not sanctioned by the constitutional provisions establishing the commission.

A comparable problem is illustrated by the opinion in Myers v. United States, 272 U.S. 52 (1926), in which the Supreme Court held that Congress could not place restrictions on the removal by the President of an employee of the executive branch of the government. The Court found that Congress was interfering with the exercise of the executive power by attempting to impose restrictions.

It is important to observe that many of the provisions of Chapter 226 of the Missouri Revised Statutes were adopted prior to 1945, and exist at the present either in the same form or (as in the case of Section 226.040) with minor modifications, as they had at the time the Constitution of 1945 became effective. The adoption of a Constitution, of course, may effect changes in existing statutory patterns. To the extent that there is a conflict, the constitution prevails and supersedes the statutes. This historical information is of some importance in showing that there was no explicit legislative purpose of limiting the constitutional authority of the Commission, but rather the modification of a statutory pattern by subsequent constitutional enactment.

The very terms of the statutes, furthermore, recognize the Commission as the controlling agency. The chief engineer is required "to operate under the direction of the commission." The commission has the authority to specify his duties. There is no

Honorable William C. Phelps

express statutory prescription of duties of the chief engineer which the commission may not effectively regulate or control.

The phrase "in charge of" has been construed numerous times. The normal construction is a broad one, as synonymous with "control." Numerous definitions are found in Words and Phrases.

We conclude, therefore, that the State Highway Commission has the authority to establish the position of "director" whose duties are as specified in the above-mentioned resolution, and that it has the authority to determine the requisite qualifications for the position. The commission in exercising this authority is not subject to limitation by reason of anything contained in Section 226.040. To the extent that that section might be read as containing a limitation on the commission's authority, it is invalid and ineffective because it is in derogation of the commission's authority and responsibility as established by Article IV, Section 29 of the Constitution.

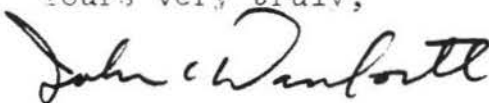
There is an additional problem regarding the salary established by the commission for this position. One might argue that the sense of Section 226.080, RSMo Supp. 1967, is that no employee of the commission is to receive a salary higher than that established for the chief engineer, who by the statutory pattern is the principal employee of the commission. We do not have to speculate about the problem which would be presented if there were an express statutory provision to this effect. The present statutes have no specific restriction, and we are unable to say that there is a violation of any statutory provision in establishing a salary of \$23,500 for the Director.

CONCLUSION

It is the opinion of this office that the State Highway Commission has the authority to establish the position of Director, and to provide that the Director shall have "general charge and supervision of the State Highway Department," and that the commission has the authority to establish the qualifications for the position and to fix the compensation out of funds available to it. We are also of the opinion that this authority is derived from the commission's general grant of power under Article IV, Section 29 of the Constitution of Missouri and that any statutory provisions which purport to limit this authority are pro tanto invalid.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

August 29, 1969

OPINION LETTER NO. 295

Honorable Joe D. Holt
State Representative
District 102
Baker Building
Fulton, Missouri 65251

Dear Representative Holt:

This is in response to your request for an opinion from this office concerning the authority of the mayor of a third class city to appoint, with the consent and approval of a majority of the members elected to the city council, such officers as he may be authorized by ordinance to appoint pursuant to Section 77.330, RSMo 1959. Specifically, you ask if Section 77.330 requires the mayor to submit to each newly elected city council the person or persons he has appointed.

In your letter you state that the City of Fulton has, by ordinance, authorized the mayor to fill the Office of City Counselor by appointment. Section 77.330, RSMo 1959, provides:

"The mayor, with the consent and approval of a majority of the members elected to the city council, shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint."

We assume that the city counselor is appointed for a fixed term of office. Once the city counselor, is appointed and qualified, he holds office for the term thereof and until his successor is appointed and qualified, unless he is removed under the provisions of Section 77.340, RSMo, or otherwise under the terms of Article VII, Section 12, Missouri Constitution of 1945, which reads:

Honorable Joe D. Holt

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

This constitutional provision was held to apply to municipal offices in the case of State ex rel. Voss v. Davis, 418 S.W.2d 163, 168 (Mo. 1967).

We are enclosing an official opinion of the Attorney General rendered to Frank L. Pulley under date of April 21, 1939 which answers your second question.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. to Pulley
4-21-39

CORPORATIONS:
PROFESSIONAL CORPORATIONS:
ARCHITECTS & ENGINEERS:

A corporation organized under "The General and Business Corporation Law of Missouri," Chapter 351, RSMo 1959, may have as a purpose the prac-

tice of architecture and professional engineering. A corporation organized pursuant to "The Professional Corporation Law of Missouri," Chapter 356, RSMo Supp. 1967, may also have as a purpose the practice of architecture and professional engineering. A corporation organized pursuant to either of the above mentioned chapters must have a certificate of authority issued by the State Board of Registration for Architects and Professional Engineers before it may solicit, offer and render architectural or professional engineering services in this state. It is not necessary for the Board to revoke or cancel the certificate of authority of a corporation organized pursuant to Chapter 356 if that corporation should elect to continue doing business under Chapter 351.

OPINION NO. 296

August 21, 1969

Mrs. Olean Barton, Secretary
State Board of Registration for
Architects and Professional Engineers
Post Office Box 184
Jefferson City, Missouri 65101

Dear Mrs. Barton:

This official opinion is issued in response to your request for an opinion on the following questions:

1. May a corporation organized pursuant to "The General and Business Corporation Law of Missouri," Chapter 351, RSMo 1959, have as a purpose the practice of architecture or professional engineering in view of "The Professional Corporation Law of Missouri," Chapter 356, RSMo Supp. 1967.

2. Is the authority of the State Board of Registration for Architects and Professional Engineers limited, in the case of corporations organized pursuant to Chapter 356, to approving a corporate name and certifying to the Secretary of State that the incorporators are licensed by the Board; or, does the Board also have authority pursuant to Section 327.080, RSMo 1959, to issue a certificate of authority to such corporations?

Mrs. Olean Barton

3. If the Board has authority and does issue a certificate of authority to a corporation organized pursuant to "The Professional Corporation Law of Missouri" and that corporation later decides, pursuant to the provisions of Section 356.170, RSMo Supp. 1967, to amend its Articles of Incorporations and do business as a corporation organized under "The General and Business Corporation Law of Missouri," must the Board revoke or cancel the certificate of authority of the corporation?

In answer to the first question, a corporation organized pursuant to Chapter 351, RSMo 1959, may under Section 351.020, RSMo 1959, have as a purpose the practice of architecture or professional engineering. That section provides (with certain exceptions that are not here pertinent): "Corporations for profit. . . may be organized under this chapter for any lawful purpose or purposes."

Section 327.080(2), RSMo 1959, states in part:

"Any corporation, foreign or domestic, now or hereafter organized and having as a purpose or as one of its purposes the practicing of architecture or professional engineering. . . may obtain a certificate of authority. . . and render architectural or professional engineering services in this state. . ."

It is clear from the above section that the practice of architecture or professional engineering would be a lawful purpose for a corporation organized pursuant to Chapter 351.

"The Professional Corporation Law of Missouri," Chapter 356, RSMo Supp. 1967, would allow architects or professional engineers to form a "Professional Corporation," Section 356.020(1), (2) (b), RSMo Supp. 1967. Chapter 356 has no provision that would restrict a corporation organized pursuant to Chapter 351 from engaging in the practice of architecture or professional engineering. Chapter 356 only deals with "Professional Corporations." A corporation organized pursuant to Chapter 351 would not be a "Professional Corporation." However, there is no statutory provision which would limit the practice of architecture or professional engineering solely to "Professional Corporations."

In response to your second question, the authority of the Board is not limited to approving a corporate name and certifying to the Secretary of State that the incorporators are licensed by the Board

Mrs. Olean Barton

as required by Section 356.040, RSMo Supp. 1967. The Board may also issue a corporate certificate of authority to a "Professional Corporation."

Under Section 327.080, RSMo 1959, before any corporation may solicit, offer and render architectural or professional engineering services in this state it must obtain a certificate of authority. This would be true of a corporation organized pursuant to Chapter 356 unless that chapter either expressly or impliedly superseded the provisions of Chapter 327 dealing with corporate certificates of authority.

A reading of Chapter 356 reveals no provisions that would expressly supersede those provisions of Chapter 327.

We find that Chapter 356 cannot be construed to repeal the corporate certificate of authority provisions of Chapter 327 by implication. The Missouri Supreme Court has often stated that repeal by implication is not favored. For example, in *State v. Ludwig*, 322 S.W.2d 841 (1959) the Missouri Supreme Court, en banc, quoted with approval, at page 848, the following language from an earlier case:

" . . . 'Repeals by implication are not favored-- in order for a latter statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand.' *State ex rel. and to Use of Geo. B. Peck Co. v. Brown*, 340 Mo. 1189, 1193, 105 S.W.2d 909, 911. . . ."

The corporate certificate of authority provisions of Chapter 327 are not repugnant to Chapter 356, nor are these two chapters inconsistent. Provisions found in Chapter 327, provide a means by which the Board is able to regulate corporations rendering architectural or professional and engineering services in the state. Section 327.110, RSMo 1959, lists seventeen grounds that would justify action by the state board to suspend, revoke, refuse to renew or refuse to issue a corporate certificate of authority. If the Board were not permitted to issue certificates of authority to Chapter 356 corporations, the Board would be powerless to act against such corporations if the corporations were to engage in the practices dealt with in Section 327.110, RSMo 1959.

Mrs. Olean Barton

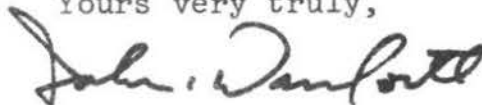
It should be noted whether or not a professional corporation organized to practice architecture or professional engineering has a certificate of authority, does not affect its existence as a duly organized "Professional Corporation." But without such a certificate a corporation may not engage in those activities where the statutes require a certificate.

In response to your third question, Section 356.170, RSMo Supp. 1967, permits a corporation to amend its Articles of Incorporation to prohibit its continuing operation under Chapter 356 and substitute therefor authority to function under Chapter 351. There is no statute that would require the Board to cancel or revoke a certificate of authority issued to a corporation organized pursuant to Chapter 356 if that corporation elected to amend its Articles of Incorporation and do business as a corporation organized under Chapter 351.

CONCLUSION

It is the opinion of this office that a corporation organized under "The General and Business Corporation Law of Missouri," Chapter 351, RSMo 1959, may have as a purpose the practice of architecture and professional engineering. A corporation organized pursuant to "The Professional Corporation Law of Missouri," Chapter 356, RSMo Supp. 1967, may also have as a purpose the practice of architecture and professional engineering. A corporation organized pursuant to either of the above mentioned chapters must have a certificate of authority issued by the State Board of Registration for Architects and Professional Engineers before it may solicit, offer and render architectural or professional engineering services in this state. It is not necessary for the Board to revoke or cancel the certificate of authority of a corporation organized pursuant to Chapter 356 if that corporation should elect to continue doing business under Chapter 351.

Yours very truly,



JOHN C. DANFORTH
Attorney General

STATE BOARD OF EDUCATION: Review and certification of application
ELEMENTARY & SECONDARY of the State Board of Education for Grant
EDUCATION ACT OF 1965: under Title V of the Elementary and
FEDERAL-STATE AGREEMENTS: Secondary Education Act of 1965, P.L.
89-10, as amended.

ANSWER BY LETTER: WIELER

June 18, 1969



Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson City, Missouri 65101

OPINION LETTER NO. 298

Dear Mr. Wheeler:

This is in answer to your request for our review of the State Board of Education Application No. FY 1970, (dated June 18, 1969) for a Grant to Strengthen the State Department of Education under Title V of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended (20 U.S.C. 861, et seq.).

It is the opinion of this office that the Missouri State Board of Education is the agency in this state primarily responsible for state supervision of public elementary and secondary schools, and, is the "state educational agency" as defined in Section 801(k) of Title VIII, Public Law 89-10, as amended; and that that agency has the authority under state law to submit an application for a grant pursuant to Section 503 of Title V, Public Law 89-10. See Section 161.092, RSMo 1967 Supp.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Very truly yours,

JOHN C. DANFORTH
Attorney General

JCD:rds

ANSWER BY LETTER: WIELER

STATE BOARD OF EDUCATION:
VOCATIONAL EDUCATION ACT:
FEDERAL-STATE AGREEMENTS:

Review and certification of State Plan
of State Board of Education under the
Vocational Education Act of 1963, as
amended.

June 18, 1969



Mr. B. W. Robinson
Assistant Commissioner
Director, Vocational Education
Department of Education
State of Missouri
Jefferson City, Missouri 65101

OPINION LETTER NO. 301

Dear Mr. Robinson:

This is in answer to your request for our review of the proposed State Plan for Vocational Education, which was written to comply with the Vocational Education Act of 1963, as amended by Title I of the Vocational Education Amendments of 1968 (Public Law 90-576).

It is the opinion of this office that the Missouri State Board of Education is the State Board in this state within the meaning of Section 108(8) of Public Law 90-576, that said Board has the authority under state law to submit a State Plan, that said Board has the authority to administer or supervise the administration of the proposed State Plan, that all the provisions of the proposed plan can be carried out by the state, and that the Missouri State Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the proposed State Plan and to represent the Missouri State Board of Education in all matters pertaining thereto. See Sections 178.430, 178.440, 161.112, and 161.132, RSMo 1967 Supp.

In conjunction with this letter opinion which constitutes our official certification of the proposed State Plan, we have completed the form "Certificate of Attorney General" as required by the U. S. Commissioner of Education.

Very truly yours,

JOHN C. DANFORTH
Attorney General

JCD: rds

September 24, 1969



OPINION LETTER NO. 302
Answer by Letter - Bartlett

Honorable Frank L. Mickelson
Representative
One Hundred, Tenth District
Freeman, Missouri 64746

Dear Representative Mickelson:

This letter is in response to your request for an opinion on the validity of Belton City Ordinance No. 69-394.

Being a fourth class city, Belton has limited powers and can exercise only such powers as are expressly granted by statute to it or those powers necessarily incidental to or implied by the powers expressly granted. City of Richland v. Null, 194 Mo. App. 176, 185 S.W. 250, 251 (1916).

Belton is granted the power to regulate certain businesses by Section 94.270, RSMo 1959.

"The mayor and board of aldermen shall have power and authority to regulate and to license and to levy and collect a license tax on . . . merchants of all kinds . . . automobile agencies, and dealers, . . . dealers in automobile accessories, . . . and all other businesses, trades and avocations whatsoever, . . ."

"Merchants of all kinds", "automobile dealers" and "all other businesses, trades and avocations whatsoever" are broad enough terms to include used car dealers. Having the power to regulate used car dealers, the question becomes whether Ordinance No. 69-394 is a valid exercise of that power.

Honorable Frank L. Mickelson

Ordinance No. 69-394 should be measured against the following constitutional provisions:

1. The equal protection clause of the Fourteenth Amendment to the United States Constitution;

" . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Article I, Section 2, Missouri Constitution;

"That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

3. Article I, Section 10, Missouri Constitution;

"That no person shall be deprived of life, liberty or property without due process of law."

4. The due process clause of the Fourteenth Amendment, United States Constitution;

"No state shall . . . deprive any person of life, liberty or property without due process of law, . . ."

5. Article III, Section 40(30), Missouri Constitution;

"The general assembly shall not pass any local or special law:

* * * *

"(30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject;"

Honorable Frank L. Mickelson

In analyzing the validity of the ordinance in question under the due process and equal protection clauses of the federal and state Constitutions, it is important to realize that the power to "regulate" granted to Belton by Section 94.270, RSMo 1959 means to prescribe the manner in which a thing licensed may be conducted. A grant of power to regulate a business carries with it the authority on the part of the city to exercise the police power impliedly vested in it to accomplish the municipal function delegated. Marshall v. Kansas City, 355 S.W.2d 877, 882 (Mo. S.Ct. en banc, 1962).

Is the ordinance in question an arbitrary or unreasonable exercise of the police power vested in the City of Belton? Initially, we must determine whether the ordinance in question has been enacted for the protection, and in furtherance of the peace, comfort, safety, morality and general welfare of the inhabitants of Belton. ABC Liquidators, Inc. v. Kansas City, 322 S.W.2d 876 (Mo. S.Ct. Div. No. 1, 1959). We believe that the Belton Board of Aldermen could have believed that it was necessary to enact the ordinance in question to protect the safety and general welfare of the inhabitants of Belton. For instance, to require adequate lighting may discourage vandalism and theft, adequate ingress and egress may promote traffic safety and restriction of used cars to a particular part of the lot may improve overall appearance.

However, to be a reasonable exercise of the police power, any classification made by the ordinance must rest on a sound basis in fact. ABC Liquidators, Inc. v. Kansas City, *supra*. Ordinance No. 69-394 purports on its face to regulate only "used vehicle lots in the City of Belton which are not operated in conjunction with new car vehicle sales". Is there a sound basis in fact for excluding from the coverage of Ordinance 69-394 used vehicle lots operated in conjunction with new car sales?¹

Footnote

1. On July 29, 1969, we wrote the City Attorney of Belton, Missouri requesting that he forward to us a copy of all Belton Ordinances pertaining to the sale of new or used automobiles. On August 1, 1969, he transmitted to us a copy of Ordinance 69-394 and Ordinance 69-18. 69-18 proposes to regulate the sale of used vehicles made in conjunction with the sale of new cars in a similar manner as Ordinance No. 69-394 seeks to do for used cars sold not in conjunction with new cars. However, the City Attorney of Belton advised us that Ordinance 69-18 has not been passed. Therefore, the foregoing opinion is based on the assumption that Ordinance No. 69-394 is the only Belton Ordinance regulating the sale of used automobiles.

Honorable Frank L. Mickelson

This is the same question as arises in analyzing whether the ordinance in question is a special law under Article III, Section 40(30) of the Missouri Constitution. See ABC Liquidators, Inc. v. Kansas City, supra. Therefore, our analysis below of the reasonableness of the classification for determining if the ordinance in question is a special law would also apply to the question of whether it violates the due process and equal protection clauses of the United States and Missouri Constitutions.

Article III, Section 40(30) prohibits the General Assembly from passing a local or special law where a general law could have been made applicable. This provision applies to city ordinances as well as to state statutes. Mathison v. Public Water Supply District No. 2, 401 S.W.2d 424, 432 (Mo. S.Ct. Div. No. 1, 1966); McKay v. Kansas City, 256 S.W.2d 815, 816 (Mo. S.Ct. en banc, 1953).

Two questions must be answered before concluding that Ordinance 69-394 is or is not a special law:

1. Is the ordinance in question a local or special law and,
2. If it is, could a general law have been made applicable?

See Mathison v. Public Water Supply District No. 2, supra.

The party attacking Belton Ordinance No. 69-394 would have the burden of showing that the classification made by the ordinance between used vehicle lots operated in conjunction with new vehicle sales and those operated separately is unreasonable. ABC Liquidators v. Kansas City, supra, at 855.

A special law has been defined as follows:

"It is well established in this state that a law is not a special law if it apply to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis."
City of Springfield v. Smith, 322 Mo. 1129, 19 S.W.2d 1, 3 (1929)

* * * *

". . . But, as pointed out above it is not necessary to the validity of such legisla-

Honorable Frank L. Mickelson

lation that it shall include every possible activity which might be included in the subject-matter. The demands of the organic law are satisfied if all similarly situated are included and none are omitted whose relationship to the subject-matter cannot by reason be distinguished from that of those included." Id. at 5.

* * * *

"We are not here so much concerned with determining how many activities which threaten to disturb the subject-matter sought to be protected could or might be included in the one piece of legislation, but our problem of instant concern is whether some have been omitted from the ordinance now involved which it would be clearly unreasonable and arbitrary to omit." Id.

"The definition and tests frequently employed to distinguish special or local from general legislation has been stated thus: 'A statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is special * * *.' * * * 'The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes.' * * * 'If in fact the act is by its terms or 'in its practical operation, it can only apply to particular persons or things of a class, then it will be a special or local law, however carefully its character may be concealed by form of words.'" Reals v. Courson, 349 Mo. 1193, 164 S.W.2d 306, 307-308 [1-5]; Laclede Power & Light Co. v. City of St. Louis, supra, 182 S.W.2d 1.c. 72 [2-4]."Mathison v. Public Water Supply District No. 2, supra, at 432. (Emphasis added)

Does the ordinance in question include all similarly situated?
Has anything been omitted from the coverage of the ordinance whose

Honorable Frank L. Mickelson

relationship to the subject matter cannot by reason be distinguished from those included? All used vehicle lots which are operated in conjunction with new car sales are expressly excluded from the coverage of this ordinance. Are such lots in any less need of adequate lighting to prevent vandalism and theft? Are such lots in any less need of adequate ingress and egress to prevent traffic hazards? Are such lots in any less need of adequate paving? Are such lots in any less need of adequate signs for identification? Is there something about those lots which make them incapable of being eye sores? Is there any reasonable basis for singling out those selling only used automobiles and those selling used automobiles in conjunction with new automobiles? We cannot answer these questions in the affirmative. If the purpose of this legislation was to further the safety and general welfare of the inhabitants of Belton by attempting to correct certain inherent evils or difficulties associated with the used vehicle business, we can see no reason why the provisions of the ordinance are not just as appropriate to the used car operations of new car dealers. Therefore, we believe that the classification contained in Belton Ordinance No. 69-394 is an unreasonable, arbitrary classification and that this ordinance violates the prohibition in the Missouri Constitution against special legislation.

Could a general law have been made applicable? The answer to this question is apparent because all used vehicle lots could have been included in the coverage of Ordinance 69-394.

Having concluded that the classification contained in Ordinance 69-394 is an unreasonable classification for the purposes of the provision of the Missouri Constitution prohibiting special legislation, we also conclude that the classification is unreasonable for the purposes of the due process and equal protection clauses of the Missouri and United States Constitutions. Therefore, we believe that Ordinance 69-394 is violative of those provisions, also.

Very truly yours,

JOHN C. DANFORTH
Attorney General

VITAL STATISTICS:
HEALTH:
DIVISION OF HEALTH:
DEATH CERTIFICATES:
FORGERY:

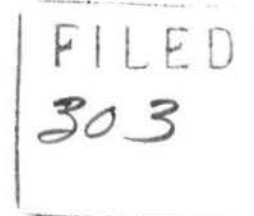
Funeral directors who make copies of death certificates prior to filing with the local registrar and with the Division of Health or funeral directors who make copies of certified copies of death certifi-

cates are in violation of the provisions of Section 193.380, RSMo Supp. 1967.

OPINION NO. 303

October 9, 1969

L.M. Garner, M.D.
Acting Director
Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Dr. Garner:

This opinion is in response to your question asking whether funeral directors who make copies of death certificates prior to submitting said certificates to the Division of Health for filing and recording are in violation of any statutory provisions.

It is our understanding that funeral directors often make copies of death certificates for their own files and thereafter make additional copies for other persons upon request. Sometimes the copies that they have furnished to other persons have been notarized by notaries public as a true copy of the death certificate. At the time of copying these "certificates" have not been sent to the local registrar; and although they are on the form furnished by the Division of Health and are completed and signed by the physician, they are not Division of Health certified death certificates.

We note first that under Section 193.070, RSMo Supp. 1967, the Director of the Division of Health or a deputy appointed by him is the State Registrar and has charge of vital statistics and is the custodian of all vital files and records. He has the authority to perform the duties prescribed; and under Section 193.240, RSMo Supp. 1967, it is unlawful for any officer or employee of the state to disclose data contained in vital statistical records except as authorized by law and by the Division. Essentially, the Division of Health has the ultimate control of the content and dissemination of the information contained in vital statistical records.

L.M. Garner, M.D.

Section 193.380, RSMo Supp. 1967, states in part as follows:

"1. Any person who wilfully makes or alters any certificate or certified copy thereof provided for in this chapter, except in accordance with the provisions of this chapter, shall be fined not more than one thousand dollars or confined in the county jail for not longer than six months, or both fined and confined."

Section 193.130, RSMo 1959, provides:

"Registration of deaths and stillbirths. -- A certificate of every death or stillbirth shall be filed with the local registrar of the district in which the death or stillbirth occurred within three days after the occurrence is known; or if the place of death or stillbirth is not known then with the local registrar of the district in which the body is found within twenty-four hours thereafter. In every instance a certificate shall be filed prior to interment or other disposition of the body."

Section 193.140, RSMo 1959, provides in full as follows:

"1. The person in charge of interment shall file with the local registrar of the district in which the death or stillbirth occurred or the body was found a certificate of death or stillbirth within three days after the occurrence.

"2. In preparing a certificate of death or stillbirth the person in charge of interment shall obtain and enter on the certificate the personal data required by the division from the persons best qualified to supply them. He shall present the certificate of death to the physician last in attendance upon the deceased or to the coroner having jurisdiction who shall thereupon certify the cause of death according to his best knowledge and belief. He shall present the certificate of stillbirth to the physician, midwife or other person in

L.M. Garner, M.D.

attendance at the stillbirth, who shall certify the stillbirth and such medical data pertaining thereto as he can furnish.

"3. Thereupon the person in charge of interment shall notify the appropriate local registrar, if the death occurred without medical attendance, or the physician last in attendance fails to sign the death certificate. In such event the local registrar shall inform the local health officer and refer the case to him for immediate investigation and certification of the cause of death prior to issuing a permit for burial, cremation or other disposition of the body. When the local health officer is not a physician or when there is no such officer, the local registrar may complete the certificate on the basis of information received from relatives of the deceased or others having knowledge of the facts. If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification."

It is clear therefore that the person in charge of interment has certain duties with respect to the preparation and filing of death certificates. However, such persons are not charged with the duty of maintaining vital statistics, nor do they have the statutory right or duty to furnish such certificates or copies thereof to other persons. It is also clear that the legislature has given the Bureau of Vital Statistics of the Division of Health the sole authority to perform the required functions with respect to vital statistics to the exclusion of other persons.

With the framework of these laws in mind, we next consider the application of Section 193.380, RSMo Supp. 1967, which has been set out above. Whether or not a funeral director who makes a copy of the certificate before it has been sent to the Division of Health, or of a certificate which has been completed by the Division of Health and certified by the Division as a certified copy of the death record violates the provisions of Section 193.380, depends largely upon the interpretation of the word "makes".

In this respect, it is recognized in 54 C.J.S., p. 907, that the word "make" is at best a very ambiguous term and has many significations and may convey many meanings. It is our opinion, however, that the word "makes" is used in the same sense as used in the more common significance of forgery; i.e., it is recognized

L.M. Garner, M.D.

that the acts of making and altering are not the same. The act of forging is "to make or imitate falsely; to produce or devise, to fabricate" or "to make in the likeness of something else". State v. Talbot, 160 Me. 103, 198 A.2d 163, 166 (1964). Similarly, "forgery" is the "fraudulent making or alteration of a writing to the prejudice of another man's rights." Rowley v. U.S., 191 F.2d 949, 950 (1951); Phleger v. Phleger, 345 Mo. 512, 134 S.W.2d 26 (1938).

The crime of forgery of such documents is contained within the provisions of Section 561.011, RSMo 1959. Section 193.380 does not speak in terms of forgery. However, Section 193.380 provides that the willfull act of making or altering any certificate or certified copy is, in fact, a crime without showing prejudice to another man's rights, which is presumed under the terms of that section and without showing that the making is fraudulent.

The conclusion we reach then is that the term "makes" was intended by the legislature and is sufficiently comprehensive to include the copying of these certificates because copying is, in fact, the making of the certificate without regard as to whether or not the copy is fraudulently made.

CONCLUSION

It is therefore the opinion of this office that funeral directors who make copies of death certificates prior to filing with the local registrar and with the Division of Health or funeral directors who make copies of certified copies of death certificates are in violation of the provisions of Section 193.380, RSMo Supp. 1967.

This opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

August 19, 1969

OPINION LETTER NO. 304

Honorable Lawrence J. Lee
State Senator, District 3
506 Olive Street
St. Louis, Missouri



Dear Senator Lee:

This is in response to your request for an opinion from this office concerning the pay of a retired Circuit Court Judge of the City of St. Louis who has elected to become a special commissioner under the provisions of Section 476.450, RSMo 1959. Specifically, you ask whether or not a retired St. Louis City Circuit Court Judge who has elected to come under the provisions of Section 476.450 is entitled to one-third of his total salary as Circuit Court Judge or only one-third of the salary which was paid by the state.

Section 476.450, RSMo 1959, provides:

"Any person having reached the age of sixty-five years and having in this state served an aggregate of twelve years, continuously or otherwise, as a judge or commissioner of the supreme court, or as a judge or commissioner of any of the courts of appeals, or as a circuit judge, or as a judge of a court of criminal correction, or as a judge of a court of common pleas, or either or both as judge or commissioner of any of said courts, and who shall have ceased to hold such office by reason of the expiration of his term, or voluntary resignation or retirement by reason of having reached the age of seventy-five years, under section 25, article V, of the Constitution of Missouri, shall, if he so elects as hereinafter provided, be made, constituted

Honorable Lawrence J. Lee

and appointed a special commissioner or referee for and during the remainder of his life and shall, while he remains a resident of Missouri, be entitled to and shall receive as annual compensation, salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law for the office from which he has retired, and said sum shall be payable monthly out of the general revenue of the state of Missouri."

It is very clear from the terms of this statute that a new special commissioner is to receive as salary an amount equal to one-third of the salary provided for by law for the office from which he has retired. Therefore, the fact that a St. Louis City Circuit Court Judge receives part of his annual judge's salary out of the state treasury and part from the city pursuant to Section 478.013, RSMo Supp. 1967, is of no consequence.

It is our opinion that a retired St. Louis City Circuit Court Judge who has accepted a position as a special commissioner pursuant to Section 476.450, RSMo 1959, is entitled to one-third of the total salary provided for the office from which he has retired.

Yours very truly,

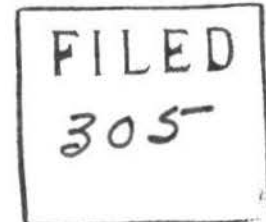
JOHN C. DANFORTH
Attorney General

MISSOURI STATE SOIL AND
WATER DISTRICTS COMMISSION:
NOTICE OF ELECTION TO LOCAL
BOARDS OF SUPERVISORS:

Elections for the members
of boards of soil and
water district supervisors
must be preceded by legal
notice of the time, place,
and purpose of the election.

September 18, 1969

OPINION NO. 305



Honorable Lee E. Norbury, Executive Secretary
Missouri State Soil and Water Districts Commission
705 Hitt, University of Missouri
Columbia, Missouri 65201

Dear Mr. Norbury:

This official opinion is issued in response to your
request for an opinion relating to elections of soil
district supervisors. Your question is as follows:

"Is it necessary under the statutes that
these elections be advertised with a Legal
Notice published in a newspaper or given
any other type of legal notice?"

Section 278.110, RSMo Supp. 1965, provides for the
establishment of boards of soil and water district super-
visors. Such supervisors are to be elected under "rules
and procedures formulated by the soil and water commission."
The statute is silent on notice, time, and place of elections
except they are not to "fall upon the date of any regular
political election held in that county."

Please find enclosed Opinion No. 62 addressed to the
Missouri State Soil Districts Commission on February 17,
1950. In response to a request for opinion on rules and
procedures developed for these elections by the Commission,
that opinion concluded, at page 4, that "at least one
notice of the day and place of election in each weekly
newspaper in the county so that the land representatives
have due notice of the election or referendum" should have
been provided for in the rules regarding such election. This
office agrees with that opinion that notice is necessary.

Honorable Lee E. Norbury

According to the general rule, in special elections, that is, elections where the time and place for holding are to be fixed by an authority having the power to do so (as the Soil and Water Districts Commission in this case), notice of the time, place, and purpose of the election is mandatory. 26 AM Jur 2d, Elections, § 195.

The controlling Missouri authority on notice of elections is the case of State ex rel. Stipp v. Colliver, 243 S.W.2d 344 (Mo. 1951). That case dealt with a referendum on the organization of a new school district, but the principle announced is general in application. At page 350, the court stated:

" . . . Where, as is usually the case in special elections, the time and place for holding the same are not fixed by law but are to be fixed by some authority named in the statute after the happening of a condition precedent, the statutes as to giving notice thereof are considered mandatory, and failure to give notice or issue proclamation of such an election will render it a nullity; . . . "

You will note that the initial election of a board of soil and water district supervisors would be clearly special in nature as the incidents of such election would be determined under rules and procedures formulated by the soil and water commission. Subdivision (2) of § 278.110, RSMo Supp. 1965, provides that the four members so elected will serve four year terms staggered so that two members shall come up for election every two years. It is the position of this office that these elections to be held after the initial election are also special as opposed to general elections. Although the length of terms of office are explicitly set forth so that elections should occur approximately every two years succeeding the initial election, the statute itself does not give notice of when this initial election would be. That is, to have notice of such elections, a person in the district would have to know the date when the first election was held independently of any matter contained in the statute other than the inference that elections would be held at two year intervals following that first election. Therefore, every election of members to a local board of soil and water district supervisors would be special and require that notice be given.

Honorable Lee E. Norbury


This office suggests that notice of elections of supervisors be given by publication once each week for two consecutive weeks immediately preceding the week of the election in a newspaper of general circulation published in the county (as is true in the case of notice of hearings and referendums for the organization of watershed subdistricts under Section 278.190, RSMo 1959, and for county elections under Section 108.050, RSMo 1959) and that said notice include (1) purpose of the election, (2) date of the election, (3) at what place or places polls will be located, and (4) during what hours the polling places will be open. Such notice also may be given in any other reasonable manner, such as by newsletter or notice by mail.

CONCLUSION

Therefore, it is the opinion of this office that in elections of members to boards of soil and water district supervisors pursuant to rules and procedures promulgated by the Soil and Water Commission, legal notice is necessary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. Atty. Gen. No. 62, Missouri State Soil
Districts Commission, 2-17-50.

SEARCH WARRANTS:
POLICE:
CITIES, TOWNS & VILLAGES:

Supreme Court Rule 33.02 controls the execution of search warrants. By allowing execution by "peace officers," it thus authorizes officers of a municipal police department in cities of the third class to execute search warrants.

OPINION NO. 306

August 21, 1969

Honorable Joe F. Rains
State Representative
District 115
700 East Tenth
Sedalia, Missouri 65301

Dear Representative Rains:

In your recent request for an opinion you submitted the following questions:

" . . . must a search warrant be executed by the Sheriff or a Constable only, or may the officers of the department execute such a warrant? (in cities of the third class) Also, does a 'Constable' include the officers of the Police Department?"

A number of statutes and procedural rules deal with the execution of search warrants. They include the following statutory provisions:

Section 542.270 and 542.290, RSMo 1959, refer to search warrants for allegedly stolen or embezzled property. Section 542.270 states that the warrant be directed to the sheriff or constable. Execution shall be carried out by a "public officer." Section 542.290.

Section 542.380, RSMo Supp. 1967, relating to search warrants for gambling devices, obscene materials and abortion equipment, provides that the warrant be issued to the sheriff or any constable.

The sheriff or "other officer authorized by law" may execute search warrants pursuant to the provisions of the Liquor Control Law. Section 311.810, RSMo 1959.

Section 417.330, RSMo 1959, permitting the issuance of search warrants to investigate the unlawful use of liquid containers, does not indicate who shall execute the warrant.

Honorable Joe F. Rains

A warrant permitting search for salvage property is to be issued to the sheriff. Section 420.280, RSMo 1959.

Section 252.100, RSMo 1959, refers to search warrants for illegally possessed wildlife. It authorizes the execution by a conservation agent, a sheriff, or marshal, or a deputy of such officers.

The rules of criminal procedure of the Missouri Supreme Court clarify the situation and are controlling, in this instance. The Constitution of Missouri, Article V, Section 5, authorizes the Supreme Court to establish rules of practice and procedure for the state judicial system. Supreme Court Rule 33.01 deals primarily with the procedure to be followed to have a search warrant issued. It provides, in part, that a search warrant be "... directed to any peace officer. . ." Supreme Court Rule 33.02 states that "Every such search warrant shall be executed by a peace officer and not by any other person."

The drafters of these rules intended to clarify the ambiguities regarding the execution of search warrants caused by the numerous statutes providing for the issuance and execution of search warrants. Peace officers were designated to execute search warrants because of their superior qualifications. See Committee Report on Proposed Rules of Criminal Procedure (1951).

The third class status of Sedalia does not diminish the applicability of the rules of criminal procedure governing search warrants. Section 85.561-1, RSMo 1959, states:

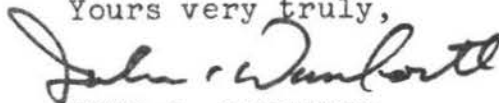
"In all third class cities the members of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city."

As "conservators of the peace," police officers are clearly "peace officers" and thus able to execute search warrants, pursuant to Supreme Court Rule 33.02.

CONCLUSION

It is the opinion of this office that Supreme Court Rule 33.02 controls the execution of search warrants. By allowing execution by "peace officers," it thus authorizes officers of a municipal police department in cities of the third class to execute search warrants.

Yours very truly,


JOHN C. DANFORTH
Attorney General

June 27, 1969

OPINION LETTER NO. 307

Honorable Charles E. Valier
Representative, Sixty-Ninth District
407 North Eighth Street
St. Louis, Missouri 63101

Dear Representative Valier:

This is in response to your letters of June 13, 1969, requesting my opinion as to the authority of the City Counselor of the City of St. Louis to issue an opinion interpreting the Urban Redevelopment Law (Chapter 353 RSMo) and its implementing ordinances (Chapter 29, St. Louis City Ordinances). The City Counselor's opinion was issued to the Municipal Business Development Commission of the City of St. Louis.

The Office of City Counselor is created by Article X of the St. Louis City Charter. Section 2 of Article X of the Charter among other things directs the City Counselor to advise all officers of the City as to all legal questions affecting the City's interest. Chapter 31 of the St. Louis City Ordinances creates the Municipal Business Development Commission as an office of the city government. Therefore, the City Counselor may properly render his opinion on the meaning and effect of the Urban Redevelopment Law, Chapter 353 RSMo and ordinances adopted in implementation thereof.

Very truly yours,

JOHN C. DANFORTH
Attorney General

August 22, 1969

OPINION LETTER NO. 308

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Holman:

This letter is in response to your opinion request concerning the following questions:

"1. Is the county collector in third and fourth class counties empowered by any statutory provisions to collect current and back taxes for cities of the third and fourth classes?

"2. If so, is the county collector entitled to retain commissions from city tax collections for performing such services?"

Our review of the provisions relating to third class cities indicate that third class cities have a collector who is an elected officer and such office may be abolished whenever the city contracts for the collection of taxes by the county collector as authorized by Section 70.220, RSMo. Section 77.030, RSMo 1959. The duties of the city collector of a third class city are set out specifically in Sections 94.080 to 94.180, RSMo.

Likewise, with respect to cities of the fourth class, Section 79.050, RSMo Supp. 1967, states that if the Board of Aldermen does not provide for the appointment of a collector, the collector of the city shall be an elected officer and the Board of Aldermen may provide by ordinance that the same person may be elected marshal and collector. Sections 94.280 to 94.330, RSMo, in particular

Honorable Haskell Holman

deal with the duties of the collector with respect to taxation in fourth class cities.

Our review of the statutes relative to county collectors of third and fourth class counties fails to reveal that such collectors have any authority in the absence of a contract pursuant to Section 70.220, RSMo 1959, to perform any of the duties for the collection of either current or back taxes for cities of the third and fourth classes.

We are therefore of the opinion that the county collector of a third or fourth class county is not empowered by any statutory provision to collect current or back taxes for cities of the third or fourth classes and that such duty rests solely with the collectors of said cities in the absence of any cooperative agreement.

In further support of the views that we have stated, we are enclosing opinions as follows:

Opinion No. 15, 9/24/52, Caslavka
Opinion No. 230, 3/29/66, Holman
Opinion No. 172, 4/19/62, Ellis

In view of the fact that we have concluded that such county collectors cannot collect for such cities, it appears unnecessary to consider whether or not they are authorized to retain commissions from collections.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ROADS & BRIDGES:

SPECIAL ROAD DISTRICTS:

1. The commissioners of a special road district organized under the provisions of Section 233.170, RSMo

1959, and located within a fourth class county do not have the authority to make street improvements within an incorporated city of the fourth class.

2. A county court in a fourth class county is authorized to expend money derived from the special road and bridge tax levy under Section 137.555, RSMo 1959, or from the general revenue tax where such is available on the repair and upkeep of city streets in a fourth class city located within a special road district where such city streets form a part of a continuous county road system, but it cannot spend money on a bridge located within a special road district, whether said bridge lies within or without city limits.

OPINION NO. 309

August 28, 1969

Honorable Ralph B. Nevins
Prosecuting Attorney
Hickory County Court House
Hermitage, Missouri



Dear Mr. Nevins:

This is in response to your request for an official opinion from this office with respect to the following questions:

1. Do the commissioners of a special road district organized under the provisions of Section 233.170, RSMo 1959, have the authority to make street improvements within an incorporated city of the fourth class?
2. Is a county court in a fourth class county authorized to expend money or make repairs on streets located in a fourth class city which is within the limits of a special road district organized under Section 233.170, RSMo 1959?

With respect to your first question, it is our opinion that the commissioners of a special road district organized under the provisions of Section 233.170, RSMo 1959, and located within a county of the fourth class do not have the authority to make street

Honorable Ralph B. Nevins

improvements in a fourth class city within the district. No specific statutory authority exists for the expenditure of funds by a road district organized under Section 233.170 for the improvement of city streets with the exception of Section 233.195, subsection 2, RSMo Supp. 1967, which allows a road district in a county of the second or third class containing all or part of a city having a population of three hundred fifty thousand or more to expend funds collected from the County Special Road and Bridge Tax within any incorporated city, town, or village located within the district. Also, it should be noted that the legislature has provided for special city or town road districts organized under Section 233.010, RSMo 1959, which do have specific statutory authority to expend district funds on municipal streets. See Section 233.095, RSMo 1959. Therefore, it is our opinion that the legislature did not intend for a special road district organized under Section 233.170 and located within a fourth class county to expend money on the improvement of city streets within the district.

With respect to your second question, it is our opinion that the county court can expend money on streets located in a fourth class city within a road district organized under Section 233.170 under certain circumstances. Specifically, we point to Section 137.555, RSMo 1959, which provides:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of

Honorable Ralph B. Nevins

the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

Also, enclosed is a copy of Amended Opinion No. 131, issued May 26, 1966, to the Honorable Don Witt, which further enumerates an instance in which a fourth class county court can expend moneys on city streets. It is our feeling that the reasoning of this opinion is still correct even though Section 50.680, RSMo Supp. 1965, which created classes of expenditures in fourth class counties was repealed by subsequent legislation. Expenditures in fourth class counties are now governed by the provisions of Section 50.550, RSMo 1959. (See, Section 50.540, RSMo Supp. 1967, which makes Section 50.550 applicable) Therefore, it is necessary to point out that Section 50.550 does contain a restriction with regard to the repair and upkeep of bridges. Specifically, this section provides that:

" . . . The budget shall contain adequate provisions for the expenditures necessary . . . for the repair and upkeep of bridges other than on state highways and not in any special road district, . . ." (emphasis added)

Thus, a county cannot spend money on the repair and upkeep of bridges where said bridges are located in a special road district even though the bridges are located within city limits and, therefore, not subject to repair and upkeep by the commissioners of a special road district organized under the provisions of Section 233.170.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The commissioners of a special road district organized under the provisions of Section 233.170, RSMo 1959, and located within a fourth class county do not have the authority to make street improvements within an incorporated city of the fourth class.

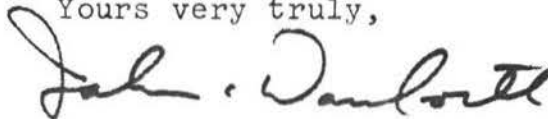
2. A county court in a fourth class county is authorized to expend money derived from the special road and bridge tax levy

Honorable Ralph B. Nevins

under Section 137.555, RSMo 1959, or from the general revenue tax where such is available on the repair and upkeep of city streets in a fourth class city located within a special road district where such city streets form a part of a continuous county road system, but it cannot spend money on a bridge located within a special road district, whether said bridge lies within or without city limits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

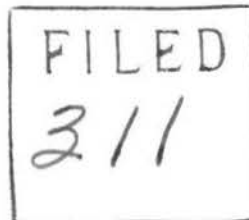
Enclosure: Op. No. 131,
5-26-66, Witt

MOTOR VEHICLE:
COMMERCIAL MOTOR VEHICLE:

A motor vehicle designed as a passenger carrying vehicle but regularly used to transport freight and merchandise is required to be registered as a commercial motor vehicle.

OPINION NO. 311

August 25, 1969



Honorable Harold L. Caskey
Prosecuting Attorney
Bates County
206 North Main
Butler, Missouri 64730

Dear Mr. Caskey:

In your letter of June 23, 1969, you requested an opinion from this office as follows:

"I am requesting an opinion from your office in the following set of circumstances. If one has already been prepared would you please provide me with a copy of the same. If not would you please submit one.

"A merchant from Hume, Missouri, owner and operator of a TV Sales and Service is the owner of a Dodge van. He has removed the set of seats from the rear and used the vehicle for the purpose of hauling cargo to and from Kansas City and also uses the vehicle to haul TV sets to and from customers. Is this individual compelled to purchase and display on that vehicle a truck license."

We assume the "Dodge Van" in question was designed by the manufacturer as a passenger carrying vehicle.

Chapter 301, RSMo 1959, covers the registration and licensing of motor vehicles in this state. Section 301.010, RSMo 1959, defines the

Honorable Harold L. Caskey

different types of motor vehicles that are required to be registered and licensed and provides in part:

"1. 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers; . . ."

Motor vehicles that are usually referred to in common parlance as "trucks" are not designated as such in this chapter.

In an opinion issued by this office on December 24, 1959, to Honorable Paul E. Williams, Prosecuting Attorney, Pike County, Bowling Green, Missouri; we held that a one-half ton pickup truck used primarily for the transportation of persons and not regularly used for transportation of freight or merchandise is a commercial vehicle under the above statute and required to be registered as such under the provisions of Chapter 301, RSMo. It defines the terms "designed" and "freight and merchandise" as used in this statute. A copy of this opinion is enclosed herewith. We believe TV sets and cargo are "freight and merchandise", when held and transported for commercial purposes.

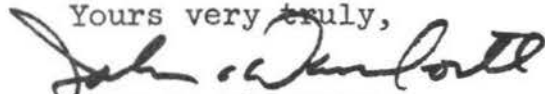
The above statute defines a commercial motor vehicle as one "designed" or used for "carrying freight and merchandise" or more than eight passengers. The basis of the opinion referred to was the fact the pickup truck was "designed" for hauling freight or merchandise even though it was not used for that purpose. Attention is called to the fact that this statute describes a commercial motor vehicle as one "designed" or "regularly used" for carrying freight or merchandise. The fact that a motor vehicle is regularly used to haul freight or merchandise brings it within the provision of this statute and requires it to be registered as a commercial motor vehicle.

CONCLUSION

It is the opinion of this department that a motor vehicle designed as a passenger carrying vehicle but regularly used for hauling freight or merchandise is a commercial motor vehicle and is required to be registered and licensed as such under the provisions of Chapter 301, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,


JOHN C. DANFORTH
Attorney General

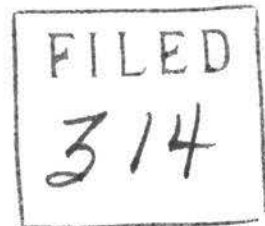
PUBLIC WATER SUPPLY DISTRICTS:
EXTENSION OF SERVICES:

The public water supply
system can refuse to
extend services because
of anticipated excessive

rates if it be affirmatively shown that the refusal was a
result of a reasonable and impartial administrative determi-
nation.

September 16, 1969

OPINION NO. 314



Honorable Charles H. Dickey, Jr.
State Representative
Room No. 315 - 98th District
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Dickey:

This official opinion is issued in response to your
request for a ruling and asking the following question:

Can a rural public water supply district
which has been formed with the use of
FHA funds, refuse to accept an applicant
by stating that due to the sparse popu-
lation, the cost of installation would
require excessive water rates?

The law applicable to this inquiry has been most
concisely enunciated by the Kansas City Court of Appeals
in Filger v. Public Water Supply District No. 1 of Clay
County, 346 S.W.2d 567 (1961). One of the assignments
of error urged by the unsuccessful applicant for increased
water supply in that case was that one of the instructions
of the trial court was erroneous in that it incorrectly
stated the law. On appeal, the instruction attacked was
held to properly declare the law of Missouri. The pertinent
part of this instruction is as follows:

Honorable Charles H. Dickey, Jr.

"The Court instructs the jury that under the law the management of the business and affairs and the exercise of the powers of defendant Public Water Supply District # 1 is vested in its Board of Directors; that the Board of Directors does not have an absolute duty to serve all inhabitants of the District with the amount of water such applicant may request, but, in the exercise of their discretion as such Directors, may refuse to furnish water to an applicant in the quantity requested, provided, however, such decision is not arbitrarily arrived at as a result of fraud or caprice or in an effort to discriminate against any particular applicant.'" (loc. cit. 573)

It appears that the issue of whether a public water supply district can refuse to extend service depends on a determination of fact. If the refusal is capricious, arbitrary, or discriminatory and not reasonably calculated for the protection of the present users, then the board of directors of such public water supply district is abusing its discretion by denying the application for services. The denial of the application is unlikely to be upheld, therefore, unless it be shown that it was the result of an impartial administrative determination based upon reasonable expectations as to the result of extending services.

The Office of the Attorney General is not equipped to make this determination of fact. Enclosed you will find a copy of a 1958 Attorney General's Opinion addressed to Senator Joynt (No. 46). Addressed to the question of the remedy of an applicant refused service by a public water supply district the conclusion of that opinion was that:

" . . . a property owner in such water supply district seeking to enforce extension of the water district's services to his property must seek his remedy through the circuit court."

The circuit court, of course, is equipped to make necessary determinations of fact. The public water supply district in litigation concerning the refusal of application would

Honorable Charles H. Dickey, Jr.

have the burden of proof to establish the fact that the refusal of the application was in good faith, non-discriminatory, and not the result of caprice.

We are advised by officials of the Farmers Home Administration that the agency does not require a water supply district to agree to furnish service to all applicants as a prerequisite to becoming eligible for funds made available by the Farmers Home Administration.

CONCLUSION

Therefore, it is the opinion of this office that a public water supply district can refuse to extend services because of anticipated excessive rates if it be affirmatively shown that the refusal was the result of a reasonable and impartial administrative determination.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,

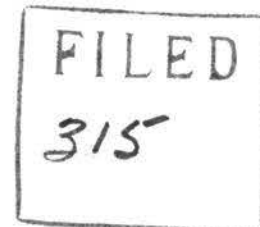
JOHN C. DANFORTH
Attorney General

Enclosure: Op. Atty. Gen. No. 46, Senator Joynt, 1-8-58.

Answer by letter-Wood

September 24, 1969

OPINION LETTER NO. 315



Honorable John J. Johnson
State Senator, District 15
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Johnson:

By letter of June 23, 1969, you inquired as to the constitutionality of House Amendment No. 1 to Senate Bill No. 180 of the Seventy-Fifth General Assembly.

Senate Bill No. 180 repeals and re-enacts §§304.018 and 304.021, RSMo 1959, which sections generally relate to regulation of traffic. House Amendment No. 1 which was adopted provides as follows:

"7. The state highway commission or local authorities with respect to roads under their respective jurisdictions, on any section where construction or major maintenance operations are being effected, may fix a speed limit in such areas by posting of appropriate signs, and the operation of a motor vehicle in excess of such speed limit in the area so posted shall be deemed prima facie evidence of careless and imprudent driving and a violation of section 304.010, RSMo."

We understand that the question is whether there is an unconstitutional delegation of legislative power.

It has been held that the highways are subject to reasonable regulation and supervision by the State in the exercise of its police power and that the State may delegate this power (State ex rel. Audrain County v. City of Mexico, 197 S.W.2d 301, 303 (Mo. 1946)). For example, a delegation by the legislature to the State Public

Honorable John J. Johnson

Service Commission of the power to prescribe safety regulations applicable to common carriers and making the violation of such regulations a misdemeanor is proper (State v. Dixon, 73 S.W.2d 385 (Mo. en banc 1934)). Although the police power in regulating motor vehicles may be delegated to local governing bodies, such local governing bodies may not in turn delegate this power to its officers or employees (Cavanaugh v. Gerk, 280 S.W. 51 (Mo. en banc 1926); Automobile Club of Missouri v. City of St. Louis, 334 S.W.2d 355 (Mo. 1960)).

House Amendment No. 1 to Senate Bill No. 180 appears to be a proper delegation of police power in regard to construction site traffic speed control provided that the State Highway Commission or the local governing body itself exercises this power. In other words, if the House Amendment were interpreted so that officers, agents or employees of the highway commission, county courts, city councils, road district commissions or township boards could themselves establish speed limits, we believe this would be an impermissible delegation of legislative police power. But if the House Amendment is interpreted and applied so that the highway commission or the local governing body itself establishes the maximum speed limit in the construction project area, then we believe the law is constitutional.

Yours very truly,

JOHN C. DANFORTH
Attorney General

TOWNSHIPS:
BONDS:
TOWNSHIP COLLECTOR:

A township board may consent to pay the cost of a surety bond of the township collector. Such consent is discretionary with the township board and if it is not given the township collector must pay the cost of such bond whether it be a personal or surety bond.

OPINION NO. 316

December 16, 1969

Honorable Paul McGhee
Prosecuting Attorney
16 North Elm Street
Dexter, Missouri 63841



Dear Mr. McGhee:

This is in response to your request for an opinion from this office as follows:

"Stoddard County has the township organization form of government, and is of the third class. I have been asked by a township collector whether your office may have an opinion stating whether a township collector must buy his own bond, or whether the township must pay for the cost of the bond. If you have any opinions on file dealing with this question, I would appreciate receiving a copy of the same."

Section 65.460, RSMo 1959, provides in part:

". . . The township collector shall before he receives the tax books give bond and security to the state, to the satisfaction of the county court, in a sum equal to one-half the largest amount collected during any one year preceding his election or appointment, including school taxes. Such bond shall be executed in duplicate, one part thereof shall be deposited and

Honorable Paul McGhee

recorded in the office of the clerk of the county court, and the other part shall be transmitted by the clerk to the state tax commission. The conditions of such bond shall be that he, the said collector, will faithfully and punctually collect and pay over all state, county, township and other revenue, including school taxes, that may become due and collectible during the period for which such collector shall be elected or appointed; and that he will in all things faithfully perform all the duties of the office of township collector according to law; provided, the county court or township board shall annually examine the collector's or trustee's bond as to form and sufficiency of surety and in case of any doubt shall require additional security."

Section 107.070 provides:

"Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county,, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this state, or by charter, ordinance or resolution, or by any order of any court in this state, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision,

Honorable Paul McGhee

to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

Your question requires interpretation of the above statutes. The basic rule of statutory construction is to seek the intention of the law makers and if possible effectuate that intention and to ascertain the legislative intent from the words used, if possible, and ascertain from the language used its plain and rational meaning. State ex rel Jones v. Ralston Purina 358 S.W.2d 772.

We are enclosing herewith an opinion issued by this office on April 4, 1939 to Honorable W. J. Melton, Charleston, Missouri, holding it is not mandatory on county courts to pay the premium on surety bonds given by the county collector but if the county collector gives a surety bond with the consent and approval of the county court to pay the premium, the entire premium is to be paid by the county and not prorated among the several agencies for which the taxes are collected. We believe the same legal principles are involved in the question now under consideration.

Under Section 65.460 supra, the township collector is required to give bond to the satisfaction of the county court equal to one-half of the largest amount collected during any one year immediately preceding his election or appointment, that he will faithfully and punctually collect and pay over all state, county, township and other revenue, including school taxes that may become due and collectible during his term of office, and the county court or township board shall annually thereafter determine the sufficiency of such bond.

Under this statute, the bond is required to be payable to the state of Missouri. The sufficiency of the amount of the bond and of the surety is to be approved by the county court. Under this statute, the township collector may give a personal bond, it need not be a surety bond.

The township collector is an elected official as is a township officer, Section 65.110 RSMo. He is the person that is required to give the bond. A township is a subdivision of a county. State ex rel Halferty v. Kansas City, 145 S.W.2d 116. Under Section 107.070, supra, any officer of a subdivision of a county may elect, with the consent of and approval of the governing body of such subdivision, to give a surety bond with the consent of and approval of the governing body, the cost to be paid by the body protected thereby. The governing body of the township is the township board, consisting of the township trustee and two members elected, Section 65.290 RSMo. Their consent to the giving of the

Honorable Paul McGhee

surety bond and for the payment of the premium would have to be obtained before a surety bond could be given. *Berry v. Linn Co.*, 165 S.W.2d 502.

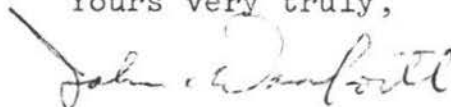
If the governing body agrees with the officer to accept the surety bond, and to pay the premium, the political subdivision it represents is obligated to pay the premium in full and it is not to be prorated among the different agencies or subdivisions protected thereby. *Motley v. Callaway County*, 149 S.W.2d 875.

CONCLUSION

It is the opinion of this office that a township board may consent to pay the cost of a surety bond of the township collector. Such consent is discretionary with the township board and, if it is not given, the township collector must pay the cost of such bond whether it be a personal or surety bond.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. 4-4-39, Melton

FEDERAL-STATE AGREEMENTS:
ELEMENTARY AND SECONDARY
EDUCATION ACT OF 1965:
STATE BOARD OF EDUCATION:

Review and Certification of State Application
(June 18, 1969) to Participate in Title III
of Public Law 89-10, (Public Law 90-247,
Section 131, Amendments to Title III of the
Elementary and Secondary Education Act of
1965).

June 30, 1969



OPINION LETTER NO. 317
Answered by Letter-Voigts

Mr. Hubert Wheeler, Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Dear Commissioner Wheeler:

Per your request, we have reviewed the Missouri State Plan (dated June 18, 1969) prepared for submission to the United States Commissioner of Education under Title III of the Elementary and Secondary Education Act of 1965 (P.L. 89-10 as amended by P.L. 90-247, section 131, amendments to Title III of the Elementary and Secondary Education Act of 1965).

Our review has taken into consideration the above-cited federal laws together with the federal regulations (45 CFR 118, draft of April 25, 1968); Article III, Section 38(a), Article IX, Section 2(a), Missouri Constitution; Section 161.092, RSMo Supp. 1967, and related provisions.

From the foregoing it is the opinion of this office that:

- (1) The Missouri State Board of Education is qualified as a State agency in accordance with section 304 of P.L. 89-10 as amended by P.L. 90-247;
- (2) Said agency has the authority under State law to submit a State plan pursuant to section 304 of P.L. 89-10, as amended by P.L. 90-247;
- (3) All the provisions with respect to the use of federal funds can be carried out in the State;
- (4) The Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the foregoing State plan and to represent the Missouri State Board of Education in all matters pertaining thereto.

Mr. Hubert Wheeler
June 30, 1969
Page 2

This opinion letter constitutes our official certification of the State Plan and should be inserted at the proper place in all copies.

Very truly yours,

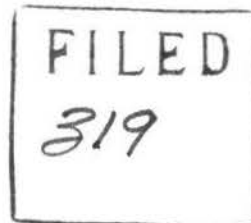
JOHN C. DANFORTH
Attorney General

UNFAIR MILK SALES PRACTICES ACT: A supermarket which demands and receives ninety days credit from dairy suppliers would be in violation of Section 416.440(3), RSMo 1959, if the nature of said credit demand is that of a discriminatory gift not available to all purchasers nor extended by all suppliers and if the effect thereof is to divert trade or injure competition.

OPINION NO. 319

September 15, 1969

Honorable Dexter D. Davis, Commissioner
State Department of Agriculture
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Davis:

This official opinion is issued in response to your request for a ruling acknowledged by this office on July 2, 1969, and asking the following question:

Is a supermarket which demands dairy suppliers give ninety days credit in violation of Section 416.440(3), RSMo 1959, the Unfair Milk Sales Practices Act?

Section 416.440(3), RSMo 1959, provides:

"3. No milk product purchaser shall accept from any milk processor or distributor any rebate, discount, free service or services, any advertising allowance, pay for advertising space used jointly, donation, free merchandise, rent on space used by retailer for storing or displaying the milk processor's or distributor's merchandise, financial aid, free equipment, or any other thing of value; . . ."

Subsection (4) provides that proof of such acceptance shall be prima facie evidence of a violation. Under Section 416.440(1) a processor or distributor who offers or gives any of the advantages to a purchaser which are listed in subsection (3) above, does not violate the Unfair Milk Sales Practices Act unless said offer or gift is ". . . with the intent or with the effect of unfairly diverting trade from a competitor, or otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, . . ." This office is of the opinion that a purchaser does not violate subsection (3) unless he is a party to a transaction in which the intent or

Honorable Dexter D. Davis

effect is as enunciated in subsection (1), supra. In this conclusion we are in accord with the Supreme Court of Missouri which in Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651, 658 (Mo. en banc 1964), stated, in regard to all sections of the Act, that:

" . . . In general, in order to constitute a violation, all of the practices prohibited must be shown to have been done with the intent or effect of unfairly diverting trade from a competitor or of destroying competition or of creating a monopoly."

You will note that subsection (3) does not explicitly require that a purchaser, who receives something prohibited thereby, intend to divert trade, injure a competitor, etc., nor that this be the effect of said reception. However, to reason from this fact that a milk product purchaser could violate this Act by entering into a transaction which in no way was intended nor has the effect of diverting trade or injuring his competition is clearly not warranted nor is it a reasonable interpretation of the legislative intent.

Therefore, in order to make proper response to your request for an opinion, two questions must be considered. 1. Is ninety days credit a ". . . rebate, discount, . . . donation, . . . financial aid, . . . or any other thing of value; . . ." meant to be prohibited by the Unfair Milk Sales Practices Act? 2. If so, is the demand for and reception of ninety days credit done with the intent to, or does it have the effect of, ". . . unfairly diverting trade from a competitor, or of destroying competition, or creating a monopoly. . ."? Foremost Dairies, Inc. v. Thomason, supra at 658. The particular facts of any situation could be determinative of the answers to either of these two questions. Therefore, certain assumptions will be made in the following discussion which, hopefully, will enable you to dispose of individual cases.

On the question of whether the demand for ninety days credit is in violation of Section 416.440(3), RSMo 1959, as the acceptance by a purchaser of any of a number of things (including "financial aid" or "any other thing of value") from a milk products supplier, you are again referred to Foremost Dairies, Inc. v. Thomason, 384 S.W.2d 651 (Mo. en banc 1964). That case concerned the issue of whether volume pricing policies of two dairies constituted a prohibited "discount." Recognizing that the term "discount" was ambiguous, as are other terms in the statute (especially "any other thing of value"), the Supreme Court applied the technique of construction known as noscitur a sociis (it is known by its associates). After listing each of the things prohibited by Section 416.440, the Court came to the following conclusion:

Honorable Dexter D. Davis

" . . . Disregarding for the moment the word 'discount,' it will be noted that the other words and clauses all carry the connotation of a donation or a discriminatory gift. The words indicate the return of a part of the purchase price or the giving of something of value as an inducement to buy the seller's products . . . In the manner used, the word [discount] does not suggest any intent to prohibit the use of volume pricing policies which do no more than reflect varying distribution costs, sometimes characterized as earned discounts, which are available to all customers of the distributor" (loc. cit. 660)

In some situations the demand for ninety days credit would not connote the demand for a discriminatory gift. This would be true if similar credit terms are made available to all purchasers and are extended by all suppliers. Reasoning from the facts (1) that the legislature defined costs to the processors as including credit losses, Section 416.410(5), and (2) that Section 416.440 is made explicitly not to apply to two per cent discount credit terms by subsection (6) thereof, it is manifestly apparent that credit sales of milk products was anticipated by the legislature and that the extension of credit is not per se a violation.

However, reasoning from the practicalities attendant to particular fact situations, it is the opinion of this office that ninety days credit could qualify as "financial aid" or "any other thing of value" meant by the legislature to be prohibited. It is apparent that credit is a thing of value. The supermarket purchaser not only has the milk products to sell but the use of a purchase price for a period of ninety days. In the present market situation, the cost of borrowing money often approaches ten percent. A milk product purchaser who was to accept ninety days credit would, in effect, have the use of the supplier's money during this period without having to pay interest, and could use this purchase price to benefit his operations in the same way a loan could be used. As an example of how such credit could constitute "financial aid," if a very large supermarket chain were to have a dairy bill of \$120,000, under ninety day credit terms, and using a ten percent interest figure, said supermarket chain would be saving \$3,000 as compared to what borrowing such a sum would cost. There is no doubt that credit constitutes valuable financial aid and is a thing of value when accepted. It is also obvious that if the ninety day credit is received by only certain purchasers it takes the form of a discriminatory gift.

This raises the second question implicit in your request for an opinion. Does the demand for ninety days credit, which under

Honorable Dexter D. Davis

the particular circumstances qualifies as a prohibited thing of value having ". . . the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, . . .".

As a general rule, the requisite intent to and effect of unduly diverting trade or of injuring a competitor are issues dependent on the facts and circumstances of each individual case. State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553, 556 (Mo. 1964); State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287, 290 (Mo. 1968). It is the province of the courts and not of this office to make the necessary determination in each case. Please note that if the extension of ninety days credit is found to have the requisite discriminatory nature, under the circumstances, this is enough to get the issue of a violation of Section 416.440 (3) before the courts. However, the courts can find no violation unless the intent or effect of diverting trade, etc., is found. State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553, 556 (Mo. 1964).

It is certainly possible that a court might find the necessary intent manifested toward a competitor or effect to a competitor when a supermarket demands and receives a ninety day extension of credit.

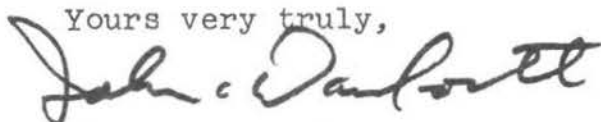
In any event the question of effect or intent in regard to injuring competition is one of fact to be determined in each individual circumstance by the courts.

CONCLUSION

Therefore, it is the opinion of this office that a supermarket which demands and receives ninety days credit from dairy suppliers would be in violation of Section 416.440(3), RSMo 1959, if the nature of said credit demand is that of a "discriminatory gift" and, if it shown that it was received with the intent to or effect of diverting trade or injuring a competitor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Alfred C. Sikes.

Yours very truly,



JOHN C. DANFORTH
Attorney General

July 3, 1969



Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Jefferson City, Missouri 65101

Dear Secretary Kirkpatrick:

In response to your letter of June 27, 1969, and pursuant to Section 125.030, RSMo., I submit the following official ballot title for the proposed constitutional amendment set forth in House Joint Resolution No. 40 of the Seventy-Fifth General Assembly:

"Removes prohibition on state treasurer succeeding himself. Permits treasurer to be elected twice unless he has served more than two years of another's unexpired term."

Very truly yours,

JOHN C. DANFORTH
Attorney General

AIR POLLUTION:

(1) The state does not have the power under Chapter 203, RSMo, to force a municipality to pass an ordinance on air pollution; (2) if a municipality does not enact an ordinance on air pollution, the individual council members are not in violation of state law and cannot be punished in regard thereto; (3) if city ordinances are passed in regard to air pollution the city must apply for an exemption from the Missouri Air Conservation Commission under Section 203.150(1), RSMo Supp. 1967, before such ordinances can be enforced; if an exemption is granted but such ordinances are not being enforced the exemption will be revoked under the provisions of Section 203.150(4), RSMo Supp. 1967, but no other penalties can be inflicted upon either the municipality or the city councilmen by the Air Conservation Commission.

OPINION NO. 322

July 10, 1969

Honorable Jack E. Gant
State Senator, District 16
9517 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"I would appreciate it if you would have your office supply me with an opinion as to whether the state has the power to force a municipality to pass an ordinance on air pollution. I would further like to know if a city does not enact an ordinance in compliance with the state law on air pollution, whether the individual council members are in violation of state law and can be punished in regard thereto. I would further request an opinion as to what penalties could be inflicted upon either the municipality or upon the city councilmen in the event a city ordinance is passed in regard to air pollution but is not enforced by the aforesaid individuals or municipalities."

Honorable Jack E. Gant

The state law on air pollution is known as the "Missouri Air Conservation Law," Chapter 203, RSMo Supp. 1967, and municipalities are empowered under Section 203.140, RSMo Supp. 1967, to enact ordinances regulating air pollution. We understand your opinion to relate to air pollution as defined by such laws and whether the state has the power under such laws to force a municipality to enact such ordinances.

If a municipality does enact such ordinances that municipality must then apply for an exemption from the Missouri Air Conservation Commission. Section 203.150, RSMo Supp. 1967. To qualify for an exemption the ordinances must be consistent with the state law and regulations. Sections 203.140 and 203.150, supra.

Although municipalities can regulate air pollution, we find no requirement in Chapter 203 or in the Constitution of Missouri or in any other law that municipalities must regulate air pollution. Therefore, the answer to your first question is that the state does not have the power to force a municipality to pass an ordinance on air pollution.

Since the answer to your first question is in the negative, it necessarily follows that the answer to your second question is in the negative.

As to your third question, we know of no penalties that can be inflicted upon either the municipality or upon the city councilmen by the Air Conservation Commission of the State of Missouri in the event a city ordinance is passed in regard to air pollution but is not enforced by such municipality or individuals. What would happen in such a situation is that the Missouri Air Conservation Commission would suspend or revoke the exemption granted to such municipality. Section 203.150(4), RSMo Supp. 1967. A revocation has the effect of repealing the ordinances. Section 203.150(4), RSMo Supp. 1967, reads as follows:

"If the commission determines at any time that a resolution, ordinance or regulation is being enforced in a manner inconsistent with the substantive provisions of this chapter or any standard, rule or regulation hereunder in any political subdivision holding a certificate of exemption, the commission shall suspend the certificate of exemption until such standards are met. If, within ninety days of the suspension, the commission finds that the standards are not being met, the commission shall revoke the certificate of exemption. The effect of the revocation shall operate to repeal the laws of the political subdivision and this chapter shall apply within the political subdivision;"

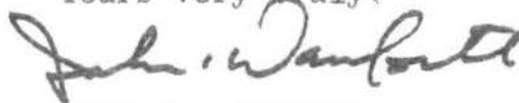
Honorable Jack E. Gant

CONCLUSION

It is the opinion of this office that: (1) the state does not have the power under Chapter 203, RSMo, to force a municipality to pass an ordinance on air pollution; (2) if a municipality does not enact an ordinance on air pollution, the individual council members are not in violation of state law and cannot be punished in regard thereto; (3) if city ordinances are passed in regard to air pollution the city must apply for an exemption from the Missouri Air Conservation Commission under Section 203.150(1), RSMo Supp. 1967, before such ordinances can be enforced; if an exemption is granted but such ordinances are not being enforced the exemption will be revoked under the provisions of Section 203.150(4), RSMo Supp. 1967, but no other penalties can be inflicted upon either the municipality or the city councilmen by the Air Conservation Commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

September 11, 1969

OPINION LETTER No. 323

Honorable Gladys Marriott
State Representative - 16th District
9001 Leeds Road
Kansas City, Missouri 64129

Dear Mrs. Marriott:

This letter is in answer to your opinion request concerning the question of whether or not Divers Equipment and Repair Service, Inc., a corporation doing business in Kansas City, would be in violation of Section 563.721, RSMo Supp. 1967, (the Sunday Closing Law) if it offered for sale a line of supplies relating to diving purposes.

We understand that a large portion of the business concerns breathing systems, air cylinders, assorted safety devices and the like.

Although we cannot pass upon numerous items in the inventory that are held for sale because we have no precise and exact description of such items, nevertheless it is our opinion that the sale of air cylinders and sale of other hardware items for use with the cylinders is, in fact, the sale of "hardware" as prohibited by Section 563.721. We are also of the opinion that the sale of special purpose watches is prohibited by the generic prohibition of the section. We note in that respect that watches are listed separately from jewelry.

Insofar as the sale of underwater garments is concerned, since such items probably are made of metal and other materials, we find it difficult without further information to state whether such garments constitute either "clothing and wearing apparel" or "hardware", both of which are prohibited expressly by the provisions of the section.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CITIES, TOWNS & VILLAGES:
CITY COUNCIL:
QUORUM:

A legal quorum of the Board of Aldermen of the City of Frontenac a fourth class city was not destroyed when three aldermen left a special meeting of the

Board of Aldermen with the purpose of preventing a vote on a resolution and that the resolution, which received more than a majority of the votes cast, was legally adopted.

OPINION NO. 324

October 9, 1969

Honorable George E. Murray
State Representative, District 38
3 Williamsburg Court
Creve Coeur, Missouri 63141

Dear Representative Murray:

This official opinion is issued in response to your request for a ruling.

Your question concerns the legality of a vote adopting a resolution by three members of the Board of Aldermen of Frontenac, a fourth class city. The Board met and all six members were reported present. However, when a certain resolution was presented for a vote, three aldermen walked out of the meeting, and the remaining three aldermen voted to adopt the resolution. You request an opinion as to ". . . whether or not the departure of the three aldermen prevented a vote on the resolution by the three remaining aldermen, and the legality of their vote."

Ordinance No. 89 of the City of Frontenac adopts Roberts Rules of Order to govern the proceedings of the Board. Roberts Rules defines a quorum as ". . . such a number as must be present in order that business can be legally transacted. . . ." Seventy-fifth Edition, Section 64, Page 257. Ordinance No. 89 also provides a quorum shall be ". . . a majority of the Board of Aldermen. . ." or, in other words, four aldermen constitute a quorum. But neither Roberts Rules, Ordinance 89 or Chapter 79, RSMo 1959 (which concerns fourth class cities) says what the effect is when members of the Board leave a meeting when a vote is called.

There have been some rulings in the analagous situation of school board meetings. In the case of Bonsack & Pearce, Inc., v. School Dist. of Marceline, 49 S.W.2d 1085 (K.C. Ct.App. 1932), a suit was brought on a contract with a school district. The contract had been agreed to by three members of the school board at a meeting

Honorable George E. Murray

attended by five of the six board members. There were no negative votes on the contract. The court said at page 1088:

"Five of the six members of the school board were present and by their presence constituted a quorum, and it became and was the duty of each and every member to vote for or against any proposition which was presented to them.
. . ."

The Court, in effect, held the members could not remain silent when presented with a resolution requiring a vote. By the same reasoning, they could not destroy a quorum by leaving the meeting for the purpose of preventing a vote.

In a previous opinion from this office issued to Honorable Lawrence F. Gepford, Prosecuting Attorney, Jackson County, Kansas City, Missouri, it was concluded that school board members who left a meeting to destroy a quorum did not thereby destroy the quorum. An opinion was requested as to the situation where two members of a six man board left the meeting to avoid voting for a replacement for a member who had just resigned. The three remaining members then voted for a replacement. Our opinion said at page 16:

"The action of Mr. McGovern and Mr. Dunn in withdrawing from the meeting must be considered to be arbitrary because it is an attempt by a minority (two members) to prevent a quorum and thus to thwart the action of a majority (three members). Since each and every member has a duty to vote for or against any proposition which is presented to them (Bonsack & Pearce v. School Dist. of Marceline, supra), there can be no good reason for the precipitous withdrawal of Mr. McGovern and Mr. Dunn after the motion was made and seconded and before a vote was called thereon. Unlike the Gaskins case, supra, no vote had been taken before Mr. McGovern and Mr. Dunn withdrew. Their action cannot be justified when it is for the sole purpose of defeating a quorum. Under these specific facts Mr. McGovern and Mr. Dunn must be considered to be present for the determination of the existence of a quorum at the vote on the proposition which was submitted to them, even though they had actually left the room at the time the vote was taken."

Under our opinion above, there was a quorum for the vote on the resolution involved here.

Honorable George E. Murray

The problem, then, is one of ascertaining whether the vote by the three aldermen who remained in the meeting was sufficient to adopt the resolution. It should be noted first that a resolution is not an ordinance and therefore the requirements of Section 79.130, RSMo 1959, do not apply. *City of Salisbury v. Nagel*, 420 S.W.2d 37, 42 (K.C. App. 1967).

There appear to be no special requirements or formalities in the statutes or ordinances for the passage of a resolution. In describing a resolution, the court in *Julian v. The Mayor, Councilmen and Citizens of the City of Liberty*, 391 S.W.2d 864, 867 (Mo. 1965) said, ". . . ' . . . A resolution is not a law, and in substance there is no difference between a resolution, order, and motion.' . . . " Roberts Rules of Order, which, as we noted above, was adopted by the Board of Aldermen of Frontenac, provides the requirements for passage of motions at page 202:

"Any legitimate motion . . . requires for its adoption only a majority; that is, more than half of the votes cast, ignoring blanks, at a legal meeting where a quorum is present, unless a larger vote for its adoption is required by the rules of the assembly." (emphasis added)

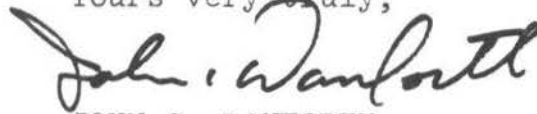
Under this rule the resolution was legally passed because only three votes were cast and two favorable votes would have been sufficient to pass the resolution.

CONCLUSION

Therefore, it is the conclusion of this office that a legal quorum of the Board of Aldermen of the City of Frontenac a fourth class city was not destroyed when three aldermen left a special meeting of the Board of Aldermen with the purpose of preventing a vote on a resolution, and that the resolution, which received more than a majority of the votes cast, was legally adopted.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Alfred C. Sikes.

Yours very truly,

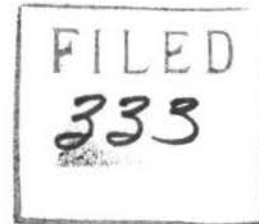

JOHN C. DANFORTH
Attorney General

CITIES, TOWNS AND VILLAGES: (1) A jury in a municipal court in
POLICE COURTS: a fourth class city in a second class
MUNICIPAL COURTS: county should be selected as pro-
vided in Chapter 499, RSMo, when no
written request has been made by a magistrate as provided for under
Section 495.040, RSMo Supp. 1967. (2) The number of jurors for
a jury in a municipal court in a fourth class city is to be deter-
mined as provided for under Section 543.210, RSMo.

OPINION NO. 333

November 18, 1969

Honorable P. Wayne Kuhlman
Assistant Prosecuting Attorney
Clay County Courthouse
Liberty, Missouri 64068



Dear Mr. Kuhlman:

This is in response to your request for an opinion from
this office in part as follows:

"I would appreciate receiving an opinion
from your office setting forth the proper
procedure for the selection of a jury
panel for the police court of the City of
Pleasant Valley, Missouri."

We understand from the correspondence which you enclosed
with your opinion request and from information furnished us by
Clifford G. Hall, Circuit Clerk, Clay County, that Clay County
has two magistrate courts -- Division No. 1 which has juris-
diction over the eastern part of Clay County, and Division No. 2
which has jurisdiction over the western part of said county.
We also understand that no written request has been made in the
past by either magistrate with the Jury Commission Board of Clay
County for it to select the jurors in magistrate court cases.

Pleasant Valley is a fourth class city located in Clay County
which is a second class county.

Section 98.550, RSMo, provides that when any person shall be
arrested in a fourth class city for the violation of a city ordi-
nance it shall be the duty of the mayor or police judge to hear
and determine forthwith the complaint alleged against the defen-
dant, unless for good cause the trial be postponed, and that

Honorable P. Wayne Kuhlman

"defendants shall be entitled to trials by jury, as in prosecution before magistrates."

Chapter 495, RSMo, provides for the selection of juries in second class counties. Section 495.040, Missouri Supplement, provides that petit juries for the circuit court "and for any magistrate court having jurisdiction in such county where the magistrate files written requests with the Jury Commission Board shall be selected as provided in Sections 495.040 to 495.190.

Chapter 499, RSMo, provides for the selection of jurors for magistrate courts. Section 499.010, RSMo, provides:

"At least once each year on or before the first day of May, the board of jury commissioners shall select names of not less than four hundred persons having all of the qualifications of jurors; and in selecting such names the board shall select such number of persons from each township as the population of such townships bear to the population of the entire county. No person shall be selected who has served on any grand, petit or magistrate jury within one year from the time of making the selection. The names and addresses of the persons selected from each township shall be written on separate slips of paper of the same kind and size and placed in a box with a sliding lid and thoroughly mixed."

It is the opinion of this office that under Section 495.040, Missouri Supplement, unless the magistrate files a written request with the Jury Commission Board for juries in his court to be selected by the Jury Commission Board in a second class county, Chapter 495, RSMo, does not apply and all juries before such magistrate court shall be selected as provided for under Chapter 499.

Supreme Court Rule 37 governs the practice and procedure of all cases in all municipal courts. Supreme Court Rule 37.53 provides in part:

"(b) Where the trial by jury is authorized by law and the defendant or his attorney requests, a jury shall be selected in the manner provided for the selection of juries in misdemeanor cases tried in magistrate courts, except as otherwise provided by law. The jury so selected shall determine the facts and render a verdict."

Honorable P. Wayne Kuhlman

Although violations of a city ordinance are not crimes but are civil proceedings, it is our opinion that under Section 98.550, RSMo, and Supreme Court Rule 37.53, Subdivision (b), supra, a jury in a municipal court is to be selected as provided for the selection of juries in misdemeanor cases in a magistrate court.

Chapter 543, RSMo, governs the proceedings before magistrate courts in misdemeanor cases. Section 543.210, RSMo, provides that all jury trials before a magistrate shall be by a jury of twelve persons unless a less number shall be agreed upon, but not less than six.

It is the opinion of this office that Section 543.210, RSMo, determines the number of jurors to be selected for the trial of a defendant charged with the violation of a city ordinance in a fourth class city.

CONCLUSION

It is the opinion of this office that:

(1) A jury in a municipal court in a fourth class city in a second class county should be selected as provided in Chapter 499, RSMo, when no written request has been made by a magistrate as provided for under Section 495.040, RSMo Supp. 1967.

(2) The number of jurors for a jury in a municipal court in a fourth class city is to be determined as provided for under Section 543.210, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
STATE COLLEGES:
SCHOOLS:

A state college or university does not violate constitutional provisions by giving credit for course taught by representative of religious denomination, so long as university premises or facilities are not used.

October 6, 1969

OPINION NO. 337

Honorable Thomas D. Graham
State Representative
122nd District
312 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Representative Graham:

This official opinion is issued in response to your request in which you ask for an opinion on certain questions relating to the constitutionality of provisions for religious instruction in state colleges and universities.

You present the following three situations:

1. A denomination maintains facilities adjacent to a state college at which it teaches bible and religious courses. The teachers are employed by and answerable to the employing denomination. The college will give academic credit for the course if it approves of the subject matter and the instructor.
2. The situation is the same as in (1), but the institution permits the use of its classrooms for purposes of instruction.
3. Same situation as in (2), except that the course is sponsored and the instructors are employed by an interdenominational body rather than by a single denomination.

We are of the opinion that situation (1) presents no constitutional infirmities, but that the use of classrooms and facilities is of very doubtful validity under the applicable state and federal constitutional provisions. In this regard we see no basis for distinguishing between a single denomination and a use by an interdenominational group.

The applicable constitutional provisions are as follows:

- a. The First Amendment to the Constitution of the United States, providing that no law may be enacted "respecting the establishment of religion, or prohibiting the free exercise thereof; . . ."

Honorable Thomas D. Graham

b. Missouri Constitution, Article I, Section 5, providing as follows:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; . . ."

c. Missouri Constitution, Article I, Section 6, providing as follows:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; . . ."

d. Missouri Constitution, Article I, Section 7, providing as follows:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

e. Missouri Constitution, Article IX, Section 6, providing that the income of the seminary fund,

". . . shall be faithfully appropriated for maintenance of the state university, and for no other uses or purposes whatsoever."

f. Missouri Constitution, Article IX, Section 8, specifies that no appropriations may be made,

". . . in aid of any religious creed, church or sectarian . . . denomination whatever; . . ."

We assume that the courses you refer to are taught in a manner consistent with the dogma of the sponsoring denomination. We also assume that the college or university authorities examine the courses and the credentials of the instructors only for the purpose of satisfying themselves that the courses have sufficient intellectual content to be acceptable for college credit. It, of course, would be necessary that the authorities show no discrimination against any denomination or sect offering a course. We also assume that the courses present academic instruction and that they are not ceremonial observances or worship services.

The giving of academic credit is a matter for the discretion of the college authorities. Prior opinions of this office express the opinion that there is no general inhibition of instruction in religion in state colleges and universities.

Honorable Thomas D. Graham

(See Opinion No. 157, 6-25-63 and Opinion No. 313-1968, enclosed.) Those opinions indicated certain restrictions when the courses are taught by members of the college faculty. In your first example, however, it would appear that there is no expenditure of public funds and no use of public facilities. We see no reason why colleges and universities could not give credit for such instruction, if they in their judgment feel that the courses have sufficient academic content to justify the granting of credit. We perceive no reason why a college could not permit the transfer of credits earned in a theological seminary, or give credit for an independent study project which deals with a purely religious subject. The mere granting of credit does not amount to the establishment of religion or to a prohibited form of aid, within the meaning of the applicable constitutional provisions.

The cases of *Engel v. Vitale*, 370 US 421, 8 L. ed. 2d 601, 82 SC 1261, (1962) and *Abington Township v. Schemp*, 374 US 203, 10 L. ed. 2d 844, 83 SC 1560, (1963) are not in point on the question of granting academic credit. The former involved the validity of a simple "interdenominational" prayer, and the latter of prayer and "ceremonial bible reading," in public school classrooms. In both cases the student was presented with the choice of participating in the exercise or of making a conspicuous withdrawal. We understand from your inquiry that the courses presented by the denominational instructors would be purely elective. The Court in the *Abington* case, moreover, drew a clear distinction between religious observance and teaching about religion.

Nor would the religious instruction at denominational expense offend against the holdings in *Harfst v. Hoegen*, 349 Mo. 808, 163 SW 2d 609 (1942) and *Berghorn v. Reorganized School District No. 8*, 364 Mo. 121, 209 SW 2d 573 (1953). These cases involved the operation of public school facilities in accordance with the interests of a particular denomination. Nothing of this sort is presented by your example.

In your second and third inquiries, however, another question is presented. This is whether a state college or university may permit the use of its classrooms for religious instruction by instructors selected by religious denominations. We gather that this connotes a regular use through a school term or school year, and therefore, we do not have to consider the validity of isolated or occasional use of school facilities by religious groups. We feel that the regular use of classrooms in this way constitutes a degree of aid which is inconsistent with the state constitutional provisions and quite possibly with the federal also.

The federal case of *Illinois ex. rel McCollum v. Board of Education of School District No. 71*, 333 US 203, 92 L. ed. 2d 649, 68 SC 461, (1948) may be read in such a way as to indicate that any use of public classrooms for religious teaching is prohibited by the First Amendment. That case invalidated a "released time" program by means of which public school pupils were directed to sessions conducted in public school classrooms by such denominations as chose to sponsor instruction. The Court also emphasized the use of the school's compulsory attendance machinery as a ground for invalidating the plan, so that the opinion does not necessarily turn on the use of classrooms.

The point does not have to be concluded with the federal cases, however, for the Missouri constitutional provisions are very broad and the courts have construed them strictly against aid to religion in any form. See *Harfst v. Hoegen*, supra,

Honorable Thomas D. Graham

Berghorn v. Reorganized School District No. 8, supra, McVey v. Hawkins, 364 Mo. 44, 258 SW 2d 927 (1953), holding that transportation of private school pupils was not a proper use of funds designated for the purpose of maintaining free public schools; Special District for the Education and Training of Handicapped Children of St. Louis County, Missouri, v. Hubert Wheeler, 408 SW 2d 60 (1966), holding that public school funds may not be used for the purpose of providing special classes in private school buildings.

There is no doubt that the regular use of a classroom is an item of value, and that the permission for such use constitutes the giving of a thing of value. This is so even though it may be argued that the state enjoys a net saving if religious denominations contribute teaching services which would otherwise be the responsibility of the college or university. When public money is appropriated to provide and maintain buildings, the use of the buildings by religious teachers would appear to be an indirect use of public funds for religious purposes within the meaning of Article I, Section 7. At the very least it must be said that such a use of public classrooms would be subject to challenge under the provisions of the federal and state constitutions.

There is no basis for distinguishing between "denominational" and "interdenominational" instruction. This is clear from Engel v. Vitale and Abington Township v. Schemp, supra. Those cases stand for the proposition that aid to religion in general or preference to religion as against non-religion, is within the constitutional inhibition. See also Illinois ex. rel McCollum v. Board of Education, supra.

CONCLUSION

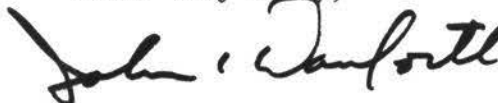
1. There is no constitutional violation if a state college or university gives academic credit for a course in religious instruction, presented by teachers selected by a religious denomination, in facilities maintained by the denomination, with the college or university having the right to approve the credentials of the teacher and the subject matter of the course as a condition of giving credit.

2. The use of state college or university classrooms for such a course in denominational religious instruction, on a regular and continuing basis, constitutes an aid to religion, and the indirect use of public funds in aid thereof, within the meaning of Article I, Section 7 of the Missouri Constitution.

3. With regard to conclusion #2, it makes no difference whether the course is presented by a single denomination or by an interdenominational association.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Encl. No. 313, 11-21-68, Curtis
No. 157, 6-25-63, Traywick



Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

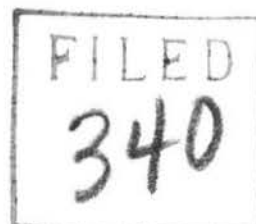
Pursuant to your request of July 16, 1969, and pursuant to the directive found in Section 125.030, RSMo 1959, I submit the following ballot title for Conference Committee Substitute for Senate Joint Resolution Number 3, of the 75th General Assembly:

Increases maximum tax rates which can be levied by city and town school districts and by counties with valuation of less than \$1,200,000,000.00 without vote.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter



OPINION LETTER NO. 340

Honorable James C. Kirkpatrick
Secretary of State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Secretary Kirkpatrick:

Pursuant to your request of July 16, 1969, and pursuant to the directive found in Section 125.030, RSMo 1959, I hereby submit a recommended ballot title for Senate Substitute for House Joint Resolution Number 4, an amendment to Article X of the Constitution substituting thereto a section to be known as Section 11 (c).

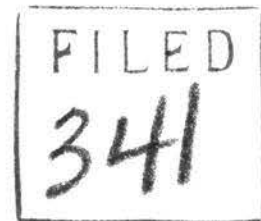
Provides tax rate in school district not proposing higher rate shall be last tax rate approved; in districts where proposed higher rate is defeated by voters, rate remains last tax rate approved but school board may resubmit higher or lower tax rate; in district where proposed lower rate is defeated, tax rate does not revert to last approved rate but may be resubmitted to vote.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Blackmar

OPINION LETTER NO. 341



Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101

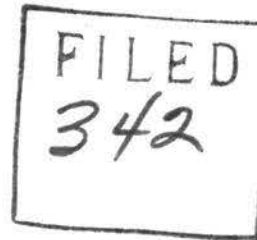
Dear Mr. Kirkpatrick:

Pursuant to your request of July 16, 1969, and pursuant to the directive found in Section 125.030, RSMo 1959, I submit the following ballot title for Senate Joint Resolution No. 9, 75th General Assembly:

Authorizes State Highway Commission to construct and operate toll roads; provides state revenue derived from highway users can be used to guarantee toll road bonds.

Yours very truly,

JOHN C. DANFORTH
Attorney General



OPINION LETTER NO. 342

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

Pursuant to your request of July 16, 1969, and pursuant to the directive found in Section 125.030, RSMo 1959, I submit the following ballot title for Senate Joint Resolution No. 12, 75th General Assembly:

Would allow citizens of a charter county to determine what services shall be supplied to their incorporated and unincorporated areas by local and county governments.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CSB: mlz



OPINION LETTER No. 343

Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

Pursuant to your request of July 16, 1969, and pursuant to the direction found in Section 125.030, RSMo, I submit the following ballot title for Senate Joint Resolution No. 13, 75th General Assembly:

"Provides annual legislative sessions, prohibits secret final vote on bills, resolutions, confirmations; reconvenes legislature to consider bills returned by governor; may provide more legislative employees.

Very truly yours,

JOHN C. DANFORTH
Attorney General



Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

OPINION LETTER NO. 344

Answered by letter - Bartlett

Dear Mr. Kirkpatrick:

Pursuant to your request of July 16, 1969 and pursuant to the directive found in Section 125.030 RSMo 1959, I submit the following ballot title in relation to the above subject:

Provides for a Court of Appeals consisting of districts in place of the present Courts of Appeal; alters the exclusive jurisdiction of the Supreme Court of Missouri; authorizes the Supreme Court of Missouri to appoint an administrator to aid in the administration of the courts; creates a commission on judicial retirement, removal and discipline; adds a provision for mandatory retirement at age seventy of all judges appointed under the provisions of Sections 29(a) - (g) of Article V.

Very truly yours,

JOHN C. DANFORTH
Attorney General

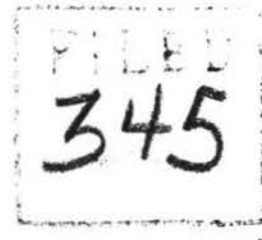
CONFLICTS OF INTEREST:
SCHOOLS:

A resident of one school district who is employed as a full time teacher in another school district can serve in the position of school board member in the district in which he resides without violating the provisions of the Conflict of Interest Law, Sections 105.450 to 105.495, RSMo Supp. 1967.

September 2, 1969

OPINION NO. 345

Honorable Carl D. Gum
Prosecuting Attorney
Cass County Courthouse
Harrisonville, Missouri 64701



Dear Mr. Gum:

This letter is in response to your request for an opinion on the following question:

"Can a resident of one School District, who is employed as a full time teacher in another School District, serve in the position of school board member in the district in which he resides without violating the provisions of the Missouri Conflicts of Law Statute, MoRS 105.450 through .495."

Section 105.450, RSMo Supp. 1967, provides:

"Definitions.-- As used in sections 105.450 to 105.495, unless the context clearly requires otherwise, the following terms have the meanings indicated:

(1) 'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches, of the state or any political subdivision thereof including counties, cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;

Honorable Carl D. Gum

(2) 'Business entity', a corporation, association, firm, partnership, proprietorship, or business entity of any kind or character;"

Section 105.490, RSMo Supp. 1967, provides:

"Private interests of state officers and employees not to conflict with public interests -- penalties. -- 1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

Section 105.495, RSMo Supp. 1967, provides:

"State officers and employees not to deal with certain persons and entities -- penalties. -- No officer or employee of an agency shall enter into any private business transaction with any person or **entity** that has a matter pending or to be pending upon which the officer or employee is or will be called upon to render a decision or pass judgment. If any officer or employee is already engaged in the business transaction at the time that a matter arises, he shall be disqualified from rendering any decision or passing any judgment upon the same. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or confinement for not more than one year, or both."

Honorable Carl D. Gum

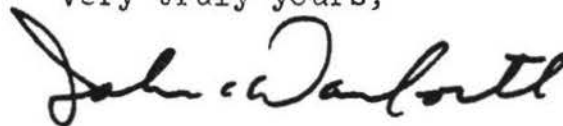
None of these sections prevent a person who may have a potential conflict of interest from holding public office. What these sections do prevent is a person with such a potential or actual conflict of interest from "Transacting business" with the agencies or entities where that conflict of interest may arise. A person with a possible conflict, as described in the statutes, cannot take part in "business transactions" concerning the entities or agencies of which he is an "officer, employee, agent, or member". However, nothing in the statutes bars that individual from being associated with those entities or agencies which might give rise to a conflict of interest. Therefore, nothing in the Regulation of Conflicts of Interest and Lobbying Law prevents a person who teaches in one school district from being a board member in another school district.

There are, of course, possibilities of conflicts of interest that could arise from the above facts. However, this office could not express an opinion on those matters unless supplied with a specific fact situation. Examples of this can be seen in the Opinions of the Attorney General, No. 26, Sloan, 3/8/66; No. 428, Lawson, 12/1/66; and No. 188, Downs, 10/3/68, attached to this opinion for your information.

CONCLUSION

It is the opinion of this office that a resident of one school district who is employed as a full time teacher in another school district can serve in the position of school board member in the district in which he resides without violating the provisions of the Conflict of Interest Law, Sections 105.450 to 105.495, RSMo Supp. 1967.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures:

- Op. No. 26, Sloan, 3/8/66
- Op. No. 428, Lawson, 12/1/66
- Op. No. 188, Downs, 10/3/68

August 29, 1969

OPINION LETTER NO. 346

Mr. George J. Eckmann, Counsel
Division of Insurance
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Eckmann:

This letter is in response to your request for an opinion as to whether the "Advance Deposit Plan" of Community Blood Bank of the Kansas City Area, Inc., as described in a brochure entitled "Blood Is Life" and the donor pledge enrollment card, copies, both of which, you have provided this office, constitutes a contract of insurance subject to the provisions of Section 375.310, RSMo 1959, providing in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *"

According to the brochure, the plan is activated by the receipt of a donor pledge enrollment card. The donor is to donate within thirty days, when called upon, or to provide an alternate donor in the event he is unable, due to physical or other reasons, to donate when called. The donor is to keep the Community Blood Bank informed of all changes in address and telephone number and is to notify the Community Blood Bank within thirty days following any transfusion.

The "Advance Deposit Plan" consists of either a family plan, which provides blood replacement credit for the donor, his spouse,

Mr. George J. Eckmann

and unmarried children under 21 years of age, or the benefit group plan, which provides blood replacement credit for four designated persons listed by the donor at the time of the application. Members of the plan are entitled to "unlimited blood replacement credit, to eliminate responsibility (non-replacement) fee for blood used in transfusion." (Emphasis in original). The benefits apply in hospitals serviced by the Community Blood Bank or which are participants in the American Association of Blood Banks Clearing House Program, including American Red Cross banks. It is represented that this includes most hospitals in the United States. Benefits may be obtained immediately following activation of the plan when blood is required for transfusions in cases of accidental injury or for expectant mothers and newborn children. Other benefits apply following sixty days from the date the plan is activated.

The plan is subject to a number of conditions. Membership is nontransferrable. Benefits do not apply for treatment of any condition that has required transfusion during the twelve month period preceding the effective date of membership, nor do they apply for any of the following diseases which are known by member or beneficiary to exist as of the date of issuance of membership: hemophilia, leukemia, malignant neoplasm, blood dyscrasia, ulcers, active tuberculosis, or heart defects. Benefits do not include any blood bank service fee, processing fee or participation fee, hospital laboratory charge or fees for services rendered in connection with the infusion of blood. Substitution of persons covered under the benefit group plan may be made only on the anniversary date of the enrollment, and newly added beneficiaries are subject to all conditions. Membership may be terminated or transferred to superseding plans by the Community Blood Bank on any anniversary date of the plan. Membership may be terminated when a member fails to fulfill his obligation as outlined above, and, in the event of war or other emergency in which the facilities of the blood bank are taken over by any governmental agency, service will be suspended.

In Attorney General Opinion No. 52 issued on August 16, 1961, to Honorable C. Lawrence Leggett, a copy of which is enclosed, this office was requested to review the Southwest Blood Service Plan offered by Southwest Blood Banks, Inc. In that opinion we held the Southwest Plan to be a contract of insurance subject to the provisions of Section 375.210, RSMo 1959.

The Southwest Plan and the Community Blood Bank Plan are not identical but quite similar. However, we find that in considering the legal question of whether the respective plans constitute contracts of insurance, the factual distinctions between the plans are not significant.

The major difference between the two plans is that the Southwest Plan provides coverage of plan members conditioned on an initial enrollment fee of one dollar and annual membership fees of one

Mr. George J. Eckmann

dollar for an individual membership, and three dollars and sixty cents for a family membership. Coverage for members of the Community Blood Bank Plan is contingent upon the signing of the enrollment card whereby the member is obligated to make a blood donation within thirty days after request by Community Blood Bank (with a limit of one donation per year). In the Southwest opinion, we cited the case of State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 257 Mo. 529, 535, 165 S.W. 1084, 1086 (1914), which stated the elements of an insurance contract in the following language:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss. . . ."

Since blood is a substance of value, an agreement promising to make a blood donation when requested by the Community Blood Bank is sufficient consideration to support the Community Blood Bank's promise to provide those protected under the plan with unlimited blood replacement credit. Therefore, in light of the Attorney General Opinion No. 52 issued on August 16, 1961, to Honorable C. Lawrence Leggett, Community Blood Bank Plan would constitute a contract of insurance subject to Section 375.310, RSMo 1959.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 52
8-16-61, Leggett

MOTOR VEHICLES:

A motor vehicle designed and assembled as construction equipment prior to sale at retail is exempt from registration.

OPINION NO. 347

August 26, 1969



Honorable Ronald M. Belt
State Representative - 96th District
108 Vine
Macon, Missouri 63552

Dear Representative Belt:

This is in response to your request for an opinion from this office as follows:

"I appreciate very much your Opinion No. 233.

"My constituent still has a doubt as the equipment was not converted by a purchaser at retail, but prior to sale at retail.

"Enclosed is the back-up material as to the factual situation.

"Appreciate clarification of the opinion as to whom the 'manufacturer' is or when the equipment becomes 'designed' under these circumstances."

The back up material to which you refer to is a factual situation described as follows:

"May 12, 1953, the Strong Equipment Co. purchased from the manufacturer, International Harvester Company, Springfield, Illinois, one International Model RF192 truck, serial no. 2015, engine number 35456. This truck was purchased for the purpose of mounting on it

Honorable Ronald M. Belt

a Model L Quickway crane. The truck was set up for off highway use with a F54B transmission, 65 gear ratio, which gives it a top road speed of approximately 45 miles per hour. International Harvester invoice covering this transaction was #17415, Quickway Truck Shovel Co. invoice #1-1080.

"The Crane unit was mounted on the International truck in our shop at Macon, Missouri, and in turn sold to the Columbia Special Road District, a government body, of Boone County, Missouri, and delivery was made on May 27, 1953."

The registration and licensing of motor vehicles is governed by Chapter 301, RSMo 1959. Under Section 301.020, the owner of every motor vehicle which is operated or driven on the highways of this state, except as otherwise provided shall be registered with the director of revenue. Section 301.010, RSMo, defines a motor vehicle as follows:

"(15) 'Motor Vehicle', any self-propelled vehicle not operated exclusively upon tracks, except farm tractors; . . ."

Section 301.133, RSMo 1959, states:

"Self-propelled construction equipment exempt--when permitted on highway.--
Self-propelled construction equipment which is equipped with pneumatic tires and which is not designed for the transportation of persons or property may be moved on the highways of this state from one job location to another or to or from places of storage delivery or repair without complying with the provisions of the law relating to registration and display of license plates but shall comply with all the other requirements of the law relating to motor vehicles; provided however that said equipment shall not be operated on state maintained roads or highways on Saturdays, Sundays or legal holidays."

Honorable Ronald M. Belt

In an opinion issued by this department on March 25, 1969, to the Honorable Ronald R. McKenzie, Prosecuting Attorney, Marion County, Hannibal, Missouri, we ruled that this statute exempts only self-propelled construction equipment with pneumatic tires designed by the manufacturer for construction work and not designed for transportation of persons or property.

In our Opinion No. 233 issued to you on May 14, 1969, we amplified the above opinion by stating only motor vehicles that comply with the requirements of Section 301.133, RSMo, at the time they are manufactured are exempt from registration under this statute. It is our view, that subsequent modification of a motor vehicle which was not designed by the manufacturer as construction equipment would not come within this statute.

You now inquire who is to be considered as the "manufacturer" or when is the equipment considered as "designed". In other words, when more than one person, company, or corporation is involved in the production of the equipment, who is considered as the manufacturer.

Section 301.010 (12), RSMo, provides:

"'Manufacturer', any person, firm, corporation or association engaged in the business of manufacturing or assembling motor vehicles for sale; . . ."

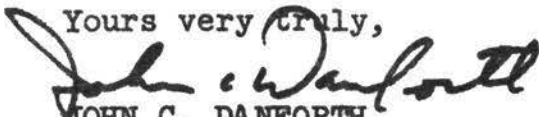
Under the above section, the manufacturer of a motor vehicle is any person or company engaged in the manufacture and assembling of motor vehicles for sale. In the fact situation set forth in your opinion request, the term "manufacturer" would refer to both International Harvester Company and the Strong Equipment Company.

CONCLUSION

It is the opinion of this office that only self-propelled construction equipment with pneumatic tires not designed by the manufacturer for the transportation of persons or property is exempt from registration under Section 301.133, RSMo 1959. A manufacturer is any person or company which takes part in manufacturing or assembling such equipment prior to its sale at retail.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,


JOHN C. DANFORTH
Attorney General

PROSECUTING ATTORNEYS:
DIVISION OF WELFARE:
JUVENILE COURTS:

It is the duty of the prosecuting attorney in a fourth class county to represent the Division of Welfare in adoption proceedings involving a child whose legal custody they have accepted.

October 21, 1969

OPINION NO. 348



Mr. Winston V. Buford
Prosecuting Attorney
Shannon County
Eminence, Missouri 65466

Dear Mr. Buford:

This is in response to your request for an opinion from this office on the following matter:

"I would like to have your opinion whether or not a Prosecuting Attorney of a fourth class county is obligated to represent the Division of Welfare wherein there is a dispute between the Division of Welfare and a man and a wife as a result of an attempt by the man and wife to adopt a child that has been placed by the Division of Welfare, and the Division of Welfare is resisting the proposed adoption."

We direct your attention to Section 56.060, RSMo Supp. 1967, which pertains to the duties of prosecuting attorneys. The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned and defend all suits against the state or county. Since under this statute, it is the duty of the prosecuting attorney to prosecute and defend actions in which the state is concerned, the question arises as to what interest the State Division of Welfare may have in adoption proceedings.

Section 207.020 RSMo Supp. 1967, defines the powers, duties and functions of the State Division of Welfare and provides in part:

Mr. Winston V. Buford

"(17) To accept for social services and care homeless, dependent or neglected children in second, third and fourth class counties whose legal custody is vested in the division of welfare by the juvenile court; . . ."

Shannon County is a fourth class county. From the facts as stated, apparently the legal custody of the child in question has been accepted by the State Division of Welfare with the approval of a court of competent jurisdiction under Section 207.020 (17) supra.

Proceedings for the adoption of children is governed by Chapter 453 RSMo Supp. 1967.

Section 453.060 RSMo Supp. 1967, provides that a writ of summons and a copy of the petition for adoption shall be served on designated persons or agencies including:

"(3) Any person, agency, organization or institution, within or without the state, having custody of the child sought to be adopted under a decree of a court of competent jurisdiction even though its consent to the adoption is not required by law;

"(4) The legally appointed guardian of the child.

"4. Upon service, whether personal or constructive, the court may act upon the petition without the consent of any party, except that of a parent whose consent is required by sections 453.030 to 453.050, and the judgment is binding on all parties so served. Any such party has the right to appeal from the judgment in the manner and from provided by the civil code of Missouri."

In the case of *In re Duren*, 200 S.W.2d 343, the court held the legal guardian of a child was entitled to notice and to appear, dissent and defend in an adoption proceeding.

Under the above statute when the State Division of Welfare has been awarded the legal custody of a child, it is necessary for a summons and a copy of the petition for adoption of such child be served on the State Division of Welfare and it has the right to appear, dissent and defend the adoption proceedings and appeal from any decision rendered. It is the duty of the prosecuting attorney to represent the State Division of Welfare when requested.

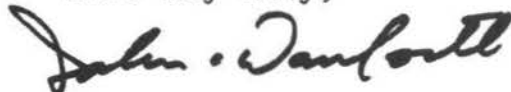
Mr. Winston V. Buford

CONCLUSION

It is the opinion of this department that it is the duty of a prosecuting attorney in a fourth class county to represent the State Division of Welfare, if requested by the Division, in an adoption proceeding involving a child whose legal custody has been accepted by the Division of Welfare under Section 207.020 RSMo Supp. 1967. .

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Answer by letter-Craft

September 29, 1969

OPINION LETTER NO. 349

Honorable Melvin Vogelsmeier
State Representative, District 109
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Vogelsmeier:

This letter is in response to your request which reads as follows:

"1. Whether or not a mayor may charge his legal expenses to the city in defending an impeachment action brought by the city counsel against such a mayor of a fourth class city?

"2. Whether or not the counselors, collectively or individually, may be held liable for slandering the mayor by making false accusations in an impeachment charged if the mayor be exonerated?"

Question No. 1.

Section 79.230, RSMo 1959, provides as follows:

" . . . if deemed for the best interest of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, . . ."

Honorable Melvin Vogelsmeier

On August 15, 1969, by letter, this statute was called to your attention and we asked whether the terms of this statute would be followed by the mayor in retaining his attorney. Since we have not heard from you, we assume that the legal expenses incurred by the mayor would not be incurred pursuant to a properly passed ordinance.

In *Dearmont v. Mound City*, 278 S.W.2d 802 (K.C.Mo.App. 1925) the court held that the employment of an attorney was not proper unless an ordinance was passed as provided by law authorizing the employment. See also *Dougherty v. City of Excelsior Springs*, 85 S.W. 112 (K.C.Mo.App. 1904). Therefore, it is our conclusion that the mayor could not in any event charge his legal expense to the city in the absence of an ordinance providing for employment of special counsel.

Question No. 2

Section 79.240, RSMo 1959, provides in part:

"Any elective officer, including the mayor, may in like manner, for cause shown, be removed from office by a two-thirds vote of all members elected to the board of aldermen, independently of the mayor's approval or recommendation. . . ."

Where a person participates in a judicial or quasi-judicial proceeding he is absolutely privileged to make libelous charges *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966). The court in this case denied the privilege because the court concluded that the facts did not bring that case within the "' . . . narrow limits . . . in which the public service or the administration of justice requires complete immunity from being called to account for language used.' . . ." 1. c. 640.

The court further stated:

" . . . The classic examples of the application of an absolute privilege are the proceedings of legislative bodies, judicial proceedings, and communications by military and naval officers. . . ."

Since removal of a mayor by a two-thirds vote of all the members of the board of aldermen is provided for by law (Section 79.240, *supra*), it is our conclusion that in such a proceeding statements made by an alderman are privileged.

In the *Pulliam* case, the court quoted with approval the granting of an absolute privilege in two cases which appeared to involve " . . . persons acting directly in quasi judicial capacities under legislative authority." 1. c. 640.

Honorable Melvin Vogelsmeier

This question is exhaustively discussed in *Laun v. Union Electric Company of Missouri*, 166 S.W.2d 1065 (Mo. 1942). The court characterized the defense of absolute privilege in this area as follows:

"'. . . the necessity, in the public interest, of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments of the government.'" 1.c. 1071

In *Callahan v. Ingram*, 26 S.W. 1020 (Mo. 1894) a member of a city council, while the council was in session, described the plaintiff as a "downright thief." In determining whether the councilman was privileged, the court stated:

". . . There can be no doubt, on proper occasion, members of the city council would be protected from 'responsibility for whatever is said by them, which is pertinent to any inquiry pending or proposed before them,' but no further. They would become 'accountable when they wander from the subject in hand to assail others.' . . ." 1. c. 1022

The court went on to say:

". . . when the objectionable words were spoken there was no inquiry pending or proposed before that house of the council, which would make the occasion one of privilege, beyond that which is accorded to every citizen. . . . Whether the occasion is such as to make the communication one of privilege is always a question of law for the court, where there is no dispute as to the circumstances under which it was made, . . ." 1.c. 1022

See also 53 C.J.S., Libel and Slander, Section 103.

A removal proceeding conducted pursuant to Section 79.240, RSMo 1959, is an inquiry pending before the council and statements made pertinent thereto would in our opinion, be a proper occasion to grant the privilege.

Although a removal proceeding by a city board of aldermen is not a judicial proceeding in the usual sense nor a legislative proceeding since the council is not acting as a legislative body, it is our opinion that a removal proceeding deserves the protection afforded governmental bodies in attempting to obtain a frank disclosure of facts with regard to the public welfare.

Therefore, it is our conclusion that the councilmen are absolutely privileged in making accusations against a mayor at a removal

Honorable Melvin Vogelsmeier

proceeding and this privilege does not depend upon the ultimate outcome of the removal proceeding.

Yours very truly,

JOHN C. DANFORTH
Attorney General

COUNTY OFFICERS:
COUNTIES:
MILEAGE:
EXPENSES:

A county court may in its discretion reimburse county officers for travel expenses necessarily and indispensably incurred in the performance of the duties of their offices.

OPINION NO. 350 & 351
(AMENDED December 31, 1975)

September 30, 1969

Honorable Haskell Holman
State Auditor
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Holman:

This is in reply to your letter of recent date wherein you inquired if it were legal for the county courts of second, third, and fourth class counties to reimburse prosecuting attorneys or their assistants, sheriffs or their deputies, county court judges, and county clerks for expenses incurred in attending specified conventions, meetings, and seminars.

This is also in reply to your letter of the same date asking if certain prior opinions of this office were still valid. These opinions were to W. W. Crockett, May 6, 1942; George P. Adams, July 18, 1947; Haskell Holman, September 10, 1963, and Harold H. Henry, March 5, 1964. The Crockett and Holman opinions relate to travel expenses for county officers attending conventions, and the Adams opinion concerns payment of mileage to county officers in day-to-day travel while engaged in county business. The Henry opinion concerns an officer's commuting expenses.

County courts have a certain latitude in managing the fiscal affairs of their counties.

" . . . county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the

Honorable Haskell Holman

merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy.

"By our Constitution, county courts are created and are given jurisdiction to transact all county business. Article 6, §36 [Art. VI, §7, 1945 Mo. Const.]. By statute, section 2078, R. S. 1929, [§49.270, RSMo 1959] such courts are given power 'to audit and settle all demands against the county.' And section 12162, R. S. 1929, [§50.160, RSMo 1959] provides that 'the county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts.' The county court, when it ascertains any sum of money to be due from the county, shall order the clerk to issue a warrant in a prescribed form. Section 12163, R. S. 1929 [§50.180, RSMo 1959]. And the county treasurer 'shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court.' Section 12136, R. S. 1929 [§54.100, RSMo 1959]."

Jackson County v. Fayman, 44 S.W.2d 849, 852 (Mo. 1931) (Emphasis added)

In approving the county's annual budget, a county court exercises discretion.

"... It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government.' Section 10917, [§50.740, RSMo 1959] . . .

* * * *

"We have noticed the Legislature has seen fit to delegate to the county court discretionary powers and duties under Section 10917 of the County Budget Law--the county court can be said

Honorable Haskell Holman

to be 'the agency most familiar with the fiscal affairs and financial condition of the county.' . . . as well as the agency most likely to soundly budget estimated receipts and expenditures to the end of efficiency and economy in county government. It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or, if such were the charge, acted fraudulently or corruptly)." (Bradford v. Phelps County, 210 S.W.2d 996, 999-1000, 1001 (Mo. 1948))

Specifically, county courts are required to approve a budget that includes ". . .all proposed expenditures for the administration, operation and maintenance of all offices, . . ." (§50.550, RSMo 1959, Class I and II Counties) and ". . .the estimated amount necessary for the conduct of the offices. . . ." (§50.680, RSMo 1959, Class III and IV Counties). In so doing, the county court is performing the:

". . .discretionary quasi-legislative function and duty, . . .of determining the necessity and amount of expenditures not otherwise specifically provided for by statute. . . ." (Miller v. Webster County, 228 S.W.2d 706, 708 (Mo. 1950))

We believe that the several county courts may properly budget for certain officers' travel expenses and thereafter reimburse the officers for such expenses upon a finding by the county court that the travel is indispensably necessary to carrying out the duties of the office. For attendance at conventions or the like, we believe the test employed by the county court should be the practical benefit of such attendance to the county. If the primary purpose of the trip is to gain information clearly applicable, or of definite utility, to the particular officer's county duties, then we believe the county court may allow reimbursement of actual and necessary expenses. However, if there is only a long term general benefit to the particular officer in attending the convention, then the county court should, in our view, decline to make the reimbursement.

In the absence of express statutory authorization, we do not believe county officers can be reimbursed for any of their expenses attributable to travel between work and residence. See Opinion No. 50,

Honorable Haskell Holman

1964, to Henry, referred to in your request, a copy of which is attached. For example, specific statutory authority for payment of mileage to county judges in third and fourth class counties for travel between their residences and the place of holding court is found in Sections 49.110 and 49.120, RSMo.

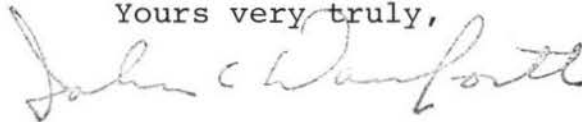
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CONCLUSION

Therefore, it is the opinion of this office that a county court may in its discretion reimburse county officers for travel expenses necessarily and indispensably incurred in the performance of the duties of their offices.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 50
3-5-64, Henry

COUNTY OFFICERS:
COUNTIES:
MILEAGE:
EXPENSES:

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OPINION NO. 350 & 351
(AMENDED December 31, 1975)

September 30, 1969

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State Auditor
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Capitol Building
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Honorable Haskell Holman

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Honorable Haskell Holman

to be 'the agency most familiar with the fiscal affairs and financial condition of the county.' . . . as well as the agency most likely to soundly budget estimated receipts and expenditures to the end of efficiency and economy in county government. It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or, if such were the charge, acted fraudulently or corruptly)." (Bradford v. Phelps County, 210 S.W.2d 996, 999-1000, 1001 (Mo. 1948))

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". . .discretionary quasi-legislative function and duty, . . .of determining the necessity and amount of expenditures not otherwise specifically provided for by statute. . ." (Miller v. Webster County, 228 S.W.2d 706, 708 (Mo. 1950))

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Honorable Haskell Holman

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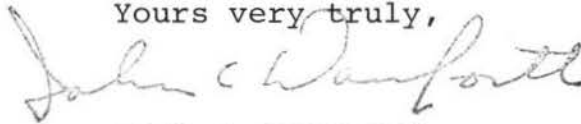
We are withdrawing the opinions of May 6, 1942, to W. W. Crockett; July 18, 1947, to George P. Adams, and September 10, 1963, to yourself. The opinion of March 5, 1964, to Harold H. Henry still represents the view of this office.

CONCLUSION

Therefore, it is the opinion of this office that a county court may in its discretion reimburse county officers for travel expenses necessarily and indispensably incurred in the performance of the duties of their offices.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 50
3-5-64, Henry

SCHOOLS:
TEACHERS:

Section 168.116 of House Bill 120
of the 75th General Assembly which
will become a law if approved by the

Governor is constitutional and forbids only those activities by a
school teacher included in the management of a campaign for the elec-
tion or defeat of a member or members of a board of education by which
he is employed.

OPINION NO. 353

August 26, 1969



Honorable Donald J. Gralike
State Representative
District 49
648 Buckley Road
St. Louis, Missouri 63125

Dear Representative Gralike:

This official opinion is issued in response to your request
for a ruling.

Your question concerns the effect of Section 168.116 of House
Bill 120 of the 75th General Assembly which states, "No teacher shall
take part in the management of the campaign for the election or de-
feat of members of a board of education by which he is employed.
. . ." Such bill will become a law if approved by the Governor.
Your letter asks:

"I would like to know to what extent a teacher
is limited in a campaign for school board mem-
bers where he is employed. Does this only per-
tain to managing a campaign? Can a teacher still
hand out campaign material in the district and
at the polls? Is it permissible for a teacher
to work on a telephone committee in behalf of
a school board candidate? Is a teacher within
his legal rights when he displays a bumper
sticker on his automobile in behalf of a school
board candidate?"

A constitutional question is raised by the above cited section
of the Teacher Tenure Act. The section restricts the right of
teachers to engage in political activity and such activity is pro-
tected conduct under the First Amendment of the United States Con-
stitution. *Swezy v. New Hampshire*, 354 U.S. 234, 250 (1956).
Therefore, we must first decide whether the section can stand at
all and if so answer your question as to its scope.

Honorable Donald J. Gralike

First Amendment rights are not absolute and in special situations are subject to limited restrictions. American Communications Assn., C.I.O. v. Douds, Regional Director of The National Labor Relations Board, 339 U.S. 382, 399 (1949). In the case which upheld the Hatch Act limitations on political activity of public employees, the Supreme Court said, ". . . The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. . . ." United Public Workers of America v. Mitchell, 330 U.S. 75, 95 (1946).

But before First Amendment rights can be restricted it is required that a substantial public interest be involved. American Communications Assn., C.I.O., supra; Parker v. Board of Education of Prince George's County, Maryland, 237 F.Supp. 222 (D.Md. 1965); Gilmore v. James, 274 F.Supp. 75, 91 (N.D.Tex. 1967). In addition, the restrictive statute must be narrowly drawn. In Shelton v. Tucker, 364 U.S. 479 (1960), the United States Supreme Court overthrew an Arkansas statute which required teachers to file affidavits annually listing every organization to which they had belonged for the previous five years. The court said at page 488:

"In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

It must be determined whether the statute in question has a sufficiently compelling public purpose to justify the restrictions imposed. The process is a balancing of the extent of the abridgment against the value of the public interest. American Communications Assn., C.I.O., supra.

The public purpose for which this statute was written was apparently to prevent the disruption of schools and school boards by political campaigns. This is a valid public purpose in view of the Supreme Court decision upholding the Hatch Act, supra, and the decisions in several states. In Minielly v. State, 411 P.2d 69 (Ore. 1966), the Oregon Supreme Court overthrew an Oregon statute which forbade civil servants to run for elective office. The court said, at page 73, that a state may adopt regulations which ". . . bear a reasonable relation to the promotion of efficiency, integrity, and

Honorable Donald J. Garlike

discipline of the public service and which are not arbitrary or discriminatory." In *Fort v. Civil Service Commission of the County of Alameda*, 392 P.2d 385 (Cal. 1964) the California Supreme Court ruled invalid a county charter provision that prohibited civil servants taking any part in the political management or affairs of any political campaign or election. The court said at page 389:

"No one can reasonably deny the need to limit some political activities such as the use of official influence to coerce political action, the solicitation of political contributions from fellow employees, and the pursuit of political purposes during those hours that the employee should be discharging the duties of his position. A strong case, we think, can also be made for the view that permitting a public employee to run or campaign against his own superior has so disruptive an effect on the public service as to warrant restriction.
. . ."

The means used to protect the public interest involved do not seem broader than necessary nor does the statute appear unnecessarily vague. The restriction is limited to a special kind of political campaign and forbids only the most active participation in such campaign.

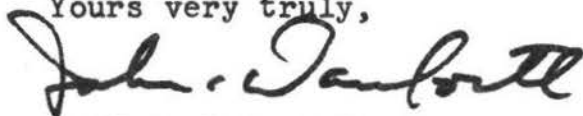
The section which we interpret here does not stifle First Amendment freedoms by leaving a teacher uncertain as to the activity hereafter condemned. "Management" connotes control. ". . . A manager is defined as one who has control of a business or business establishment. . ." *Williams v. Corbett*, 286 P.2d 115, 118 (Ore. 1955). ". . . 'Manager' ordinarily means one who has the conduct or direction of anything. . ." *People v. Boyden*, 129 N.E.2d 37, 41 (Ill. App. 1955). ". . . Management means control, superintendence or guidance. . ." *Application of David Vogel*, 268 N.Y.S.2d 237, 240 (App. Div. 1966). As long as a teacher has no share of the control or guidance of a campaign for or against one of his own school board members, he is safely within the perimeter of protected conduct. He may display bumper stickers. He may hand out campaign material, or work on a telephone committee so long as such activity does not result in his managing in whole or in part the campaign for the election or defeat of a member or members of the board of education by which he is employed. It is only necessary that he avoid exacerbation of relations between board members and teachers by initiating or taking part in the running of a campaign against or for a board member.

Honorable Donald J. Garlike

CONCLUSION

It is the conclusion of this office that Section 168.116 of House Bill 120 of the 75th General Assembly which will become a law if approved by the Governor is constitutional and forbids only those activities by a school teacher included in the management of a campaign for the election or defeat of a member or members of a board of education by which he is employed.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a similar style.

JOHN C. DANFORTH
Attorney General

October 27, 1969

OPINION LETTER No. 354



Honorable G.W. Weier
Prosecuting Attorney
Jefferson County Courthouse
Hillsboro, Missouri 63050

Dear Mr. Weier:

This is in response to your opinion request concerning the authority of the individual police officers constituting the Major Case Squad of the Greater St. Louis area with respect to arrests and search and seizure outside of the areas for which they are individually commissioned.

In answer to your question, for the sake of clarity and in view of the normal function of the Squad we assume that we are not considering questions of "hot pursuit" such as contemplated by the "hue and cry" statute, Section 544.120, RSMo 1959, or the authority of the peace officers of St. Louis County within the provisions of the "hot pursuit" statute, Section 544.157, RSMo Supp. 1967.

That is, it is our understanding that it is the primary function of the Major Case Squad to assist in providing an expeditious solution to the more serious types of crimes; and in pursuit of this purpose, the Squad is organized largely on an emergency and investigative basis.

It is also our understanding that the Major Case Squad of the Greater St. Louis area is composed of representatives of the law enforcement agencies of the Greater St. Louis area in Missouri and Illinois, including various peace officers in St. Louis County and adjoining counties.

Honorable G.W. Weier
Page 2

It is clear that a peace officer always retains the same power to arrest as does a private individual. It is also clear, however, that except for the application of the "hot pursuit" statute and with certain other exceptions not relevant here peace officers cannot act officially outside the boundaries of their respective jurisdictions. The officers involved do not have normal police powers outside of the areas for which they are individually commissioned.

Very truly yours,

JOHN C. DANFORTH
Attorney General

August 19, 1969

OPINION LETTER NO. 355

Honorable Ted Salveter
State Representative
District 142
1005 Woodruff Building
Springfield, Missouri 65806



Dear Representative Salveter:

This is in reply to your request for an opinion from this office on the following question:

" . . . Can a member of the Missouri General Assembly also serve as an attorney for a state college or other state institution or can his law firm of which he is a member and receives compensation, represent a state college. . . "

As you know, this office in a Letter Opinion to you (Attorney General Opinion No. 182, April 30, 1969) held that employment by a state college or university was employment by the state for the purposes of Article III, Section 12 of the Missouri Constitution.

That section provides in part as follows:

" . . . When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. . . . "

The question presented in this opinion hinges on the issue of whether the rendering of legal services to a state college or other state institution would be "employment" as that term is used in Article III, Section 12.

Honorable Ted Salveter

The term "employment" is subject to a variety of legal interpretations depending upon the context in which it arises. Since the purpose of Article III, Section 12 appears to be to prevent the potential conflicts of interest which would arise if a senator or representative were to have other duties with respect to other governmental bodies, we are of the opinion that a broad interpretation of the word "employment" is called for when construing that section.

We note that the term "employment" is used with reference to the attorney-client relationship in Supreme Court Rule 4.37. That rule reads, "The duty to preserve his client's confidence outlasts the lawyer's employment, . . ." (emphasis supplied).

We therefore are of the opinion that an attorney who is a state senator or representative may not represent a state college or other state institution and continue to serve as a state senator or representative. For a state senator or representative to do so would be a violation of Article III, Section 12 of the Missouri Constitution.

You also ask whether a law firm of which a senator or representative is a member may represent a state college or other state institution. Here, too, we are of the opinion that the law firm may not represent a state college or other institution. Pursuant to authority of Supreme Court Rule 5.16, The Advisory Committee of the Missouri Bar has issued Official Opinion 91. It is said in that opinion that ". . . A law firm may not render professional services with regard to any matter which any partner, associate or employee could not properly perform. . . ." This office has found no authority which would support a position contrary to the position taken by The Advisory Committee.

Yours very truly,

JOHN C. DANFORTH
Attorney General

COUNTIES:
CONSTITUTIONAL LAW:

Article 1, §7, Constitution of Missouri prohibits public funds from being used to employ a full-time chaplain for the Jackson County Jail.

OPINION NO. 356

September 30, 1969

Honorable Alvin E. Waits
State Representative, District 20
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Waits:

This is in response to your request for an opinion from this office in the following language:

"I have been requested to obtain a ruling from your office to determine if Article I, Section 7 of the Missouri Constitution precludes the expenditures of public funds to employ a clergyman as a full time chaplain for the Jackson County Jail.

"I understand an individual employed as a chaplain would have no religious duties other than at the jail."

We have been unable to find any appellate court decision in this state where the above question has been considered.

Article I, §6, Constitution of Missouri 1945 provides:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

In substance this section provides that no person should be compelled to attend, maintain or support any church, creed or denomination of religion or any priest, minister, preacher or teacher

Honorable Alvin E. Waits

of religion. This protects the individual person from being compelled by law to do these particular things. This section is substantially the same as Article 2, §6 of the Constitution of Missouri 1875.

Article I, §7, Constitution of Missouri 1945 provides:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In substance this section provides that no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect, denomination of religion or in aid of any priest, preacher, minister or teacher as such. It prohibits public funds from being used for such purposes. This section is identical with Article 2, §7 of the Constitution of Missouri 1875.

In interpreting the constitution, it is proper to consult the Debates of the constitutional convention in determining the meaning of a constitutional provision. *Preisler v. Hayden*, 309 S.W.2d 645 (Mo. 1958).

The following proceedings are recorded in Volume 2, page 222 of the Debates of the Missouri Constitution of 1875 relating to §6 and 7, Article II of the 1875 Constitution.

"The 6th section was read by the Secretary.

"Mr. Lackland: I have one objection to that and that is this. It seems to me to cut off the right of any public body as this Convention or the General Assembly, from employing a chaplain. I think we ought to provide ourselves with that right if we have use to employ one. I prefer myself the 10th section of the present Constitution, & hope some gentleman will offer it as a substitute in place of the 6th section of the report.

"Mr. Halliburton: I do not see any earthly distinction between the two sections, only in the verbiage.

Honorable Alvin E. Waits

"The 6th section was adopted.

"The Secretary read the 7th section.

"The Chairman: If there is no objection [15, 152] the section will be considered adopted.

"Mr. Wallace: I understand it is admitted that that section is intended to preclude a legislative body or convention from employing a chaplain.

"Mr. Gottschalk: The section speaks for itself.

"The Chairman: The seventh section has been adopted unless the gentleman objects.

"Mr. Wallace: Well, I do object.

"The Chairman: Objection being made then the question will be on the adoption of the seventh section.

"Mr. Lackland: I suggest also that that is an objection to the adoption of the 7th section, prohibiting any legislative body from employing a chaplain.

"Mr. Gantt: The Constitution has always done that.

"Mr. Halliburton: It is the same in the present Constitution.

"The section was adopted."

Section 10 of the Constitution of 1865 referred to by Mr. Lackland was substantially the same as §6 which was being considered.

It is apparent from these proceedings that when the members of the Constitutional Convention of 1875 were adopting these provisions, they thought that they would prohibit any public body from using public funds to employ a chaplain.

When §6 and 7 of the Constitution of Missouri 1945 were being considered by the 1945 Constitutional Convention the following proceedings transpired as found on page 1158 of the proceedings of the Constitutional Convention of 1945:

Honorable Alvin E. Waits

"Mr. Damron: . . . Now, these two sections deal with different subjects. Section 7 restricts against the taking of money from the public treasury, directly or indirectly in aid of any church, sect, denomination of religion and so forth. Whereas, Section 6, directed to the protection of the rights of individuals, says, 'no person can be compelled to erect, support or attend any place or system of worship or to maintain or support any priest, minister, teacher', and so forth. Section 6 protects the right of individuals. Section 7 is designed to protect public monies against being used for religious purposes. Now, I think the two sections, the two old sections ought to be restored in the Constitution because they are very important sections, 7 especially, I think is very important because it is the one that protects the misuse of public funds for religious purposes."

It is apparent from these Debates that the members of the Constitutional Convention of 1945 considered that these two sections and especially section number 7 were designed to protect public moneys from being used for religious purposes in any manner.

In *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. en banc 1942), the Supreme Court considered Article 2, §7 in regard to the use of public funds in a public school where sectarian religion was being taught with the regular school subjects by teachers employed and paid by the public school board. After quoting Article 2, §7 the court stated, l.c. 613:

". . . Thus, we have an explicit interdiction of the use of public money for a teacher of religion as such which has been violated by the board. . . ."

The court further states, l.c. 614:

". . . Nevertheless, the question confronting us is one only of law; of upholding our Constitution as it is written which, as lawyers and judges, we have dedicated our professional life to do. The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental

Honorable Alvin E. Waits

matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. . . ."


We believe that it is clear that Article 1, §7 of the Constitution of Missouri prohibits and was intended to prohibit any public funds from being used directly or indirectly in aid of any church, priest, preacher, minister or teacher for performing or rendering any services of a religious nature. This is true without regard to whether any particular form of worship or belief is espoused. Certainly, the use of public funds to compensate a chaplain for rendering any service of a religious nature to anyone or the giving of public funds in any manner for such services is prohibited by this constitutional provision.

CONCLUSION

It is the opinion of this department that Article 1, §7, Constitution of Missouri prohibits public funds from being used to employ a full-time chaplain for the Jackson County Jail.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Moody Mansur.

Yours very truly,


JOHN C. DANFORTH
Attorney General

COMPENSATION:
MAGISTRATES:
RETIREMENT:

A magistrate who retired on her sixty-fifth birthday prior to the enactment of 476.456 by House Bill 216 of the Seventy-Fifth General Assembly after having served twenty-two years as a magistrate is entitled to the benefits afforded by Section 476.450 and can elect to become a special commissioner and receive compensation of one-third the compensation provided by law from the office from which she has retired.

September 9, 1969

OPINION NO. 358

Mr. Clifford B. Mayberry
Assistant Prosecutor
Adair County
213 West Washington
Kirksville, Missouri 63501



Dear Mr. Mayberry:

This is in response to your request for an opinion concerning the retirement benefits available to magistrates. Your request is as follows:

"The question has arisen as to whether a magistrate who has retired on her sixty-fifth birthday, but whose term of office has not yet expired, is eligible for retirement under House Bill No. 216. The subject magistrate has had some twenty-two or more years' service as magistrate. Her term is now being served by an interim judge who was appointed by the Governor and then elected to serve out the remainder of her term at the last general election. The question, of course, is whether this judge is eligible for retirement compensation under Section 476.450 of the statutes."

House Bill No. 216 of the Seventy-Fifth General Assembly was recently signed by the Governor and will become effective October 13, 1969. This Bill amends Chapter 476, RSMo and inserts a new Section, 476.456, which reads of follows:

Mr. Clifford B. Mayberry

"1. Any person whether or not a licensed attorney having reached the age of sixty-five years, and having any prior judicial service except as a police judge, or justice of the peace of twelve years or more at the time of the passage of this act or having served an aggregate of twelve years continuously or otherwise as judge or commissioner of any of the courts provided for under the provisions of sections 16 and 18, article V of the constitution, shall have the same rights and privileges upon the same conditions as are provided for the judges and commissioners specified in section 476.450.

"2. Any judge presently serving as a magistrate or probate judge is entitled to include any time he has served as a justice of the peace of this state in computing the prior judicial service required by this section."

By the plain terms of Section 476.456 the persons enumerated in this Section shall have the same rights and privileges upon the same conditions as are provided for in Section 476.450. Section 476.450, RSMo provides that certain judges and commissioners can elect to be appointed special commissioners at a compensation of one-third the compensation provided by law for the offices from which they have retired. From the facts that you have given us, as recited above, it appears that the magistrate in question satisfies the requirement set forth in Section 476.456. The magistrate to which you refer has reached the age of sixty-five years and has had prior judicial service in excess of twelve years at the time of the passage of Section 476.456. She has served as a magistrate which is the court provided for in Section 18, Article V of the Constitution.

Therefore, it is our opinion that a magistrate who has served in accordance with the facts as you set out would be entitled to the rights and privileges provided in Section 476.450.

CONCLUSION

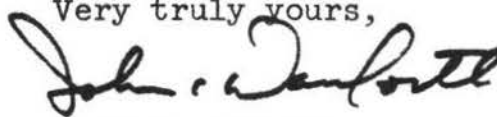
It is the opinion of this office that a magistrate who retired on her sixty-fifth birthday prior to the enactment of

Mr. Clifford B. Mayberry

476.456 by House Bill 216 of the Seventy-Fifth General Assembly after having served twenty-two years as a magistrate is entitled to the benefits afforded by Section 476.450 and can elect to become a special commissioner and receive compensation of one-third the compensation provided by law from the office from which she has retired.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

August 4, 1969



OPINION LETTER NO. 360

Answered by letter - Bartlett

Dr. Ben Morton
Executive Secretary
Missouri Commission on
Higher Education
602 Clark
Jefferson City, Missouri 65101

Dear Dr. Morton:

Pursuant to the request contained in your letter of July 9, 1969, that this office advise you whether the Missouri Commission on Higher Education can enter into a reinsurance agreement with the United States Office of Education, we have reviewed the Agreement for Federal Reinsurance of Loans Insured Under Section 428(b) of the Higher Education Act of 1965 proposed by the Office of Education.

Our review has taken into consideration (1) the Higher Education Act of 1965, 79 Stat. 1219 (1965), as amended, particularly 82 Stat. 634-638 (1968) (codified in scattered sections of 20 U.S.C. and 42 U.S.C.), (2) the Missouri Guaranteed Student Loan Program, Sections 173.095 - 173.190 V.A.M.S. Cum. Supp. 1968, and (3) the Regulations of the Commission on Higher Education propounded pursuant to Section 173.110 V.A.M.S. Cum. Supp. 1968, adopted June 12, 1968, and amended February 3, 1969.

From the foregoing it is the opinion of this office that:

1. The Missouri Commission on Higher Education has authority pursuant to Section 173.190 V.A.M.S. Cum. Supp. 1968 to enter into agreements with the United States Government in connection with Federal programs

Dr. Ben Morton

of assistance to students of higher education and vocational schools;

2. The Missouri Commission on Higher Education has an agreement pursuant to Section 428(b) of the Higher Education Act of 1965, 20 U.S.C.A. §1078(b) (Supp. 1968) with the United States Commissioner of Education, dated June 21, 1968, and, therefore, the United States Commissioner is empowered by 20 U.S.C.A. §1078(c) (Supp. 1969) to enter into a reinsurance agreement with the Missouri Commission on Higher Education;

3. With respect to so much of any loan insured pursuant to Sections 173.095 - 173.190 V.A.M.S. Cum. Supp. 1968 as may be guarantied under the proposed reinsurance agreement, the undertaking of the United States Commissioner of Education under the guaranty agreement is acceptable in full satisfaction of the State law (Section 173.110 4. V.A.M.S. Cum Supp. 1968) and regulations (Section 2.11, as amended) requiring the maintenance of a reserve.

Please refer to our letter of July 24, 1969, in which we suggested certain changes in the wording of the reinsurance agreement. This opinion is not contingent upon any of the matters set forth in that letter.

Furthermore, on July 28, 1969, we wrote you concerning revision of the agreement between United Student Aid Funds, Inc. and certain lenders. Although the revision of these lender agreements is advisable, we understand that the guaranty endorsement used by United Student Aid Funds, Inc. gives notice to lenders of the Missouri statutes and regulations under which this program is administered. Therefore, lenders have already been put on notice of the possible use of reinsurance as part of the reserve.

Very truly yours,

JOHN C. DANFORTH
Attorney General

NURSING HOME DISTRICTS:

A nursing home district may not annex territory of another nursing home district.

OPINION NO. 361

August 21, 1969

Honorable Dan Bollow
Prosecuting Attorney
Shelby County Court House
Shelbyville, Missouri 63469

Dear Mr. Bollow:

This is in response to your request for an official opinion of this office on the following question:

"Do the provisions of Section 198.320, Revised Statutes of Missouri, Laws 1963, authorize a duly incorporated nursing home district to annex the whole territory of another duly incorporated nursing home district, by the procedure therein set forth, where the nursing home district to be annexed does not operate a nursing home and has no indebtedness?"

Section 198.320, RSMo Supp. 1967, has no provisions for the annexation by one nursing home district of another nursing home district.

Section 198.200, RSMo Supp. 1967, states:

". . . The territory contained within the corporate limits of an existing nursing home district shall not be incorporated in another nursing home district."

Since there are no exceptions to this provision, we are of the opinion that the prohibition therein contained would apply in case of incorporation of territory of one district by another district by means of annexation.

We are of the opinion that the above cited statute would apply even though the territory to be annexed is part of a nursing home district which has no indebtedness and does not operate a nursing home. We base this conclusion on the fact that a nursing home district is declared "organized" once the election results creating it

Honorable Dan Bollow

have been certified, Section 198.270, RSMo Supp. 1967. Section 198.200 (2), RSMo Supp. 1967, provides:

"When a nursing home district is organized it shall be a body corporate and political subdivision of the state . . ."

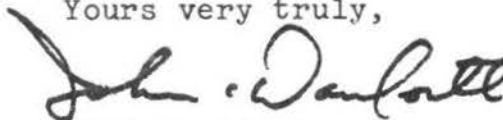
Thus the existence of a nursing home district does not depend on whether or not it has any indebtedness or operates a nursing home.

We also direct your attention to Attorney General Opinion No. 262, May 2, 1968, to the Honorable Winston V. Buford, Prosecuting Attorney of Shannon County. In that opinion we held a nursing home district created under Section 198.200, RSMo et seq., is a political subdivision of the State of Missouri and as such has no power to dissolve in the absence of statutory authority providing for such dissolution. House Bill No. 469, Truly Agreed To And Finally Passed by the 75th General Assembly, provides a statutory method for dissolution in the case of inactive nursing home districts. The Governor has not acted on this bill as of the date of this letter. We are enclosing with this opinion a copy of the Opinion to Mr. Buford and a copy of House Bill No. 469.

CONCLUSION

It is therefore the conclusion of this office that a nursing home district may not annex territory of another nursing home district.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 262
5-2-68, Buford

House Bill No. 469
75th General Assembly

CITIES, TOWNS AND VILLAGES:
SCHOOLS:
ANNEXATION:

1. Pursuant to the provisions of Section 162.421, RSMo Supp. 1967, the children in areas proposed to be annexed to the City of Columbia in October, 1969, become residents of the Columbia School District on July 1, 1970, and thus will then be eligible to attend the schools of that district, if the proposed annexation is approved.

2. The property in the annexed areas will be subject to the Columbia School District 1970 tax levy, if the proposed annexation is approved.

3. The 1969 taxes are to be paid to the school districts containing the annexed areas and are to be considered in the settlement apportioning the property and obligations of the districts from which land was taken, according to the procedure provided in Section 162.031, RSMo Supp. 1967, if the proposed annexation is approved.

September 25, 1969

OPINION NO. 362

Honorable A. Basey Vanlandingham
State Senator
19th District
Columbia, Missouri 65201

Dear Senator Vanlandingham:

This opinion is in response to your request which seeks to determine the effect of a proposed annexation by the City of Columbia to be voted on in October, 1969, of areas of school districts adjacent to Columbia, Missouri. The specific questions asked are:

"1. When do the children in the annexed areas become residents entitling them to attend the Columbia School District schools?

2. On what date do the taxes affected by the annexation accrue to the Columbia School District?

Senator A. Basey Vanlandingham

3. If the opinion is that the students become residents immediately upon annexation and the opinion is that the taxes, by statute, would not become available until after July 1 of the following year, should the taxes after the students become residents of the Columbia School District be considered in the settlement apportioning the property and obligations of the school district from which the property and students were taken?"

It is our understanding that the areas to be annexed are not in six-director districts which maintain a high school.

The children will become residents of the Columbia School District, thus entitling them to attend the Columbia schools, when the annexation is finally consummated. Section 162.421-1, RSMo Supp. 1967, provides:

"Except districts containing a city or a part of a city having more than seventy-five thousand inhabitants and districts in counties of the first class, the extension of the limits of any city or town beyond the boundaries of a six-director school district in which it is included shall automatically extend the boundaries of that district to the same extent, effective on the first day of July next following the extension of the limits of the city or town, and except in counties of the second class if the extension of the limits of the city or town includes territory contained in another six-director school district which maintains a high school, then the school district boundary lines shall not be enlarged to include territory in said six-director district by reason of the extension of the city or town limits."

Thus, according to this statutory provision, the children of the annexed districts will be eligible to attend the Columbia schools as of the first day of July, 1970, if the annexation proposal is passed in October of this year.

Senator A. Basey Vanlandingham

Attorney General's Opinion No. 96, March 22, 1956, Wheeler, is authority for holding that, despite the July 1 date established by Section 162.421, RSMo Supp. 1967, as the date the annexation officially takes effect, the real property in the annexed areas and personal property of residents of the annexed areas will be subject to the 1970 tax rates levied by the annexing district and the residents of the annexed areas will have the right to participate in the 1970 April school elections in the annexing district.

Attorney General's Opinion No. 16, May 2, 1957, Chapman, makes it clear that money collected from taxes levied and assessed in 1969 by the districts from which the land was annexed is to be paid to such districts, despite the annexation. The tax revenue derived from the 1969 levy on the property in the annexed areas becomes part of the funds of the district and would be subject to the settlement procedure of Section 162.031, RSMo Supp. 1967.

CONCLUSION

It is the opinion of this office that:

1. Pursuant to the provisions of Section 162.421, RSMo Supp. 1967, the children in areas proposed to be annexed to the City of Columbia in October, 1969, become residents of the Columbia School District on July 1, 1970, and thus will then be eligible to attend the schools of that district, if the proposed annexation is approved.
2. The property in the annexed areas will be subject to the Columbia School District 1970 tax levy, if the proposed annexation is approved.
3. The 1969 taxes are to be paid to the school districts containing the annexed areas and are to be considered in the settlement apportioning the property and obligations of the districts from which land was taken, according to the procedure provided in Section 162.031, RSMo Supp. 1967, if the proposed annexation is approved.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Peter H. Ruger.

Very truly yours,



JOHN C. DANFORTH
Attorney General

September 5, 1969



OPINION LETTER NO. 363

Mrs. Olean Barton, Secretary
State Board of Registration for
Architects and Professional Engineers
P. O. Box 899
Jefferson City, Missouri 65101

Dear Mrs. Barton:

This is in response to your request for an opinion from this office asking whether an employee of the federal government may make a land survey in Missouri for his employer without being licensed as a land surveyor by the Missouri State Board of Registration for Architects and Professional Engineers.

Section 344.020, RSMo provides that:

"It shall be unlawful for any person to practice, or offer to practice, or to in any manner advertise or indicate to the public that he is engaged in, or will engage in the practice of land surveying in this state, without first registering with the state board of registration for architects and professional engineers, as a land surveyor."

A rule of statutory construction states:

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive

Mrs. Olean Barton, Secretary

the language of the act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." 82 C.J.S. Section 317.

Essentially the same view as the above cited canon was adopted by the Missouri Supreme Court in the case of Hayes v. City of Kansas City, 241 S.W.2d 889, 892.

Prior opinions of this office, relying on the Supreme Court's holding in Hayes v. Kansas City, declined to apply Section 344.020 to county surveyors because they were not expressly included in the language of the act and, therefore, entitled to a presumption of exemption.

Based on the above authorities, it is our opinion that an employee of the federal government may make a land survey in Missouri for his employer without being licensed as a land surveyor by the Missouri State Board of Registration for Architects and Professional Engineers.

Very truly yours,

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:
LICENSES:
LOCAL COMMERCIAL
MOTOR VEHICLES:

A person, not a farmer, operating on a local commercial motor vehicle license, may not, by changing the operating address displayed on the vehicle or by any other means, legally operate outside of more than one municipality of operation and its twenty-five mile radius during the licensed period.

OPINION NO. 364

October 16, 1969

Mr. E. I. Hockaday
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri 65101



Dear Mr. Hockaday:

By your letter of July 24, 1969, you requested an opinion of this office as follows:

"A problem has arisen in our attempt to enforce the provisions of Section 301.060 as it relates to Sections 301.010 and 301.330.

To illustrate the point, John Doe, whose residence is Fulton, Missouri, was found west of Centertown, Missouri, operating on local license with an address of Fulton, Missouri, on the side. Mr. Doe, after having been arrested for exceeding the 25 mile limit on the license, changed the address to Centertown, Missouri, and is now operating from Centertown as a base. This allows him a 25 mile radius from Centertown. We contemplate that another attempt will be made to change the base of operation before finishing work on the construction job on which he is presently engaged.

We feel that Opinion No. 81, February 20, 1953, and Opinion No. 136, May 10, 1965, did not answer the question as to whether the trucker from Fulton may change his base by simply erasing one address and replacing it with another.

Mr. E. I. Hockaday

Please review these two opinions and let us know whether or not a base of operation may be changed. If so, under what conditions and in what manner should we proceed to prepare a case to present for prosecution."

In answer to your question, as to whether John Doe may change his base of operation by simply changing the address displayed on the side of his truck, while continuing to operate with a local commercial license, it is the opinion of this office that such is in violation of the provisions of Chapter 301, RSMo, and is punishable under Section 301.440, RSMo.

Paragraph (10) of Section 301.010, in pertinent part, defines a local commercial vehicle for purposes of registration and licensing, as follows:

"(10) 'Local commercial motor vehicle,' a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; . . ."

In a prior opinion for Honorable D. W. Sherman, Jr., dated February 20, 1953, this office interpreted the above-quoted provision in a context we consider analogous to the instant situation. That opinion stated, in pertinent part:

* * *

"Your fourth question is: May a man, not a farmer, on said local license (local commercial motor vehicle license) go from one job to another in excess of the twenty-five mile limit and still not be guilty of a violation of the section?

"We do not believe that he may do so. . . .

"We believe that prior to its amendment, when paragraph 10 (then paragraph 8 of Section 301.101, RSMo 1949), used the word 'any' in regard to a municipality or urban community, that it might have been held that a person, not a farmer, holding a local commercial motor vehicle license, could move from job to job beyond the twenty-five mile limit. But we further believe that when the legislature changed 'any' to 'a' it did so for some purpose, and that

Mr. E. I. Hockaday

such purpose could only have been to prevent precisely what your fourth question contemplates and to confine a person who comes under the first definition of paragraph 10, supra, to one municipality and the twenty-five mile area radiating therefrom.

"We feel that there are also numerous practical reasons why this should be so, and why this must have been the intention of the legislature in making the change in wording noted above. A local commercial motor vehicle license is much less expensive than a state-wide commercial license. When the legislature termed such a license as 'local' we believe that it must have meant what it said, namely, local, and limited.

"It must also be apparent that if a person coming under the first definition of paragraph 10, supra, could move from job to job and from one location to another location, he could operate throughout the state and so could, on a low price license, do, practically speaking, what he could properly and legally do only under a much more costly license, and so defeat the legislative intent and place himself in competition with other haulers who had complied with the law by securing the more costly and extensive operating license." (Emphasis added)

The same opinion further deemed it illegal for a person, not a farmer, to operate on a local commercial motor vehicle license beyond the singularly-contemplated twenty-five mile limit even on a pleasure trip.

We believe the Sherman opinion, supra, and its rationale are equally applicable here. The single "municipality" and its corresponding twenty-five mile radius, within which a duly licensed local commercial motor vehicle may operate, has also been referred to as the "municipality of operation" as distinguished from the "municipality of registration." (See Op. Atty. Gen., No. 136, Waggoner, May 10, 1965). The municipality of operation is required by Section 301.330, RSMo (as amended, Supp. 1967), to be designated "in a conspicuous place" on the vehicle. For the same reasons that it is illegal for a person to move from job to job in excess of a single munic-

Mr. E. I. Hockaday

ipality of operation, while operating on a local commercial motor vehicle license, it would be anomalous to allow a person to circumvent the restrictions of Section 301.010 by simply painting a different municipality of operation on the side of the truck when he moved to another job outside the previously designated municipality of operation. Neither the situation described in the Sherman opinion, supra, nor the situation presented here are consistent with the legislature's intention to prevent the holder of a less expensive local commercial license from exercising the same privileges that are granted to the lawful holders of a more expensive state-wide commercial license. (Note: Section 301.060, RSMo 1959, prescribes the fees to be paid for the respective licenses.)

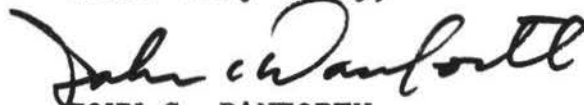
It is the opinion of this office that a single municipality of operation for the duration of the registered and licensed period is contemplated when the Director of Revenue classifies a motor vehicle as "local commercial" for registration and licensing purposes. Classification by the director is final and conclusive by virtue of Section 301.070, RSMo 1959. Accordingly, any actual change of the original municipality of operation during the same licensed period would be in violation of the limitations of Section 301.010 and inconsistent with the legislative intent underlying other provisions in Chapter 301, and would therefore subject the person(s) responsible for operation of the vehicle to punishment under Section 301.440.

CONCLUSION

It is therefore the opinion of this office that a person, not a farmer, operating on a local commercial motor vehicle license, may not, by changing the operating address required to be conspicuously displayed on the vehicle or by any other means, legally operate outside of more than one municipality of operation and its twenty-five mile radius during the licensed period.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Warren K. Morgens.

Yours very truly,


JOHN C. DANFORTH
Attorney General

SCHOOLS:
TEACHERS:
COUNTY JUDGES:

There is no constitutional or statutory provision disqualifying a person from running for the position of county judge because he is a teacher in a state college.

September 30, 1969

OPINION NO. 365

Honorable James E. Spain
Representative
One Hundred Fifty-First District
Bloomfield, Missouri 63825

Dear Representative Spain:

This is in answer to your request for the opinion of this office on whether a member of the faculty of a state college is disqualified from running for the office of county judge in a third class county. We assume that you are asking whether there is any constitutional or statutory provision which would prevent a person from running for and serving as county judge solely because he is a member of the faculty of a state college.

There is no constitutional qualification for the office of county judge which would disqualify a person because he is a state college teacher. Article VI, Section 7 of the Missouri Constitution provides for the election of a county court which shall manage all county business as prescribed by law. There is no provision in the Constitution setting forth particular qualifications for a county judge. However, Article VII, Section 8 is applicable to all public offices in the state, and states as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

Similarly, there is no statutory provision which would prevent a person from running for county judge for the sole reason that he is a teacher in a state college. Previous opinions of this office interpreting Sections 49.010 and 49.020, RSMo 1959 have held that a county judge must be a resident of the district in which he seeks election. See Opinion No. 404 dated October

14, 1963, and Opinion No. 26 dated January 27, 1944, copies of which are enclosed herewith. With the exception of this residency requirement, a candidate for county judge need only comply with the requirements of Article VII, Section 8, Missouri Constitution.

We have found no statute pertaining to professors or teachers in a state college which would disqualify such a person from seeking election and, if elected, serving as county judge. Section 174.120, RSMo 1959 places each state college "under the general control and management of its board of regents". The same statutory provision provides that the board of regents shall have full power and authority "to appoint and dismiss all officers and teachers". Section 174.140, RSMo 1959, provides that:

"Each such board shall have power to appoint and remove the president or any professor or teacher in any such state college in its district and to fix the duration, terms and conditions of their offices and compensation, and to enter into agreements for and make contributions to both voluntary and statutory retirement plans for such president, professors and teachers."

The general power over the employment and removal of teachers granted to a board of regents by Sections 174.120 and 174.140 is modified by Section 174.150 which states in part as follows:

"No president, professor or teacher shall be removed except for incompetency, neglect or refusal to perform his duties, dishonesty, drunkenness or immoral conduct; . . ."

No provision is made to remove a teacher because he seeks the office of county judge.

Should the teacher in question be elected county judge, we do not believe that the duties of a teacher in a state college and a judge of a county court would conflict. Therefore, we can see no inconsistency or incompatibility between the two positions. See State ex rel Walker v. Buss, 135 Mo. 325, 36 S.W. 636 (1896).

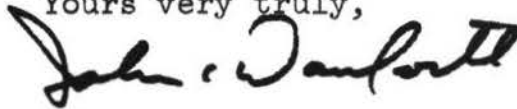
Honorable James E. Spain - 3 -

CONCLUSION

It is the conclusion of this office that there is no constitutional or statutory provision disqualifying a person from running for the position of county judge because he is a teacher in a state college.

The foregoing opinion, which I hereby adopt, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General



August 7, 1969

OPINION LETTER NO. 368

Honorable Edward Stone
State Senator
26th District
Chesterfield, Missouri 63017

Dear Senator Stone:

This is in answer to your letter of recent date in which you inquire as to the membership of the Congressional District Committee of the 9th Congressional District.

We are enclosing opinion No. 83 rendered August 20, 1968, to Representative Parker which sets forth the laws which determine the composition of congressional district committees. Such opinion holds that the chairman and vice-chairman of the county committees of all counties lying wholly within a congressional district are members of the Congressional Committee, that the chairman and vice-chairman of Legislative District Committees in counties containing at least two such districts which counties lie wholly within the congressional district are members of the Congressional District Committee and that committeemen and committeewomen of townships in St. Louis County which are wholly or partly located within a congressional district are members of the Congressional District Committee.

It is our view, therefore, that the 9th Congressional District Committee is composed of the chairman and vice-chairman of the county committees of all counties lying wholly within the district, the chairman and vice-chairman of the two legislative districts lying wholly within St. Charles County and the chairman and vice-chairman of Florissant and Spanish Lake townships which townships are within the 9th district.

Yours very truly,

JOHN C. DANFORTH
Attorney General



August 15, 1969

OPINION LETTER NO. 370

Honorable L. Edward Stone
State Senator
26th District
Chesterfield, Missouri 63017

Dear Senator Stone:

This is in answer to your letter of recent date in which you ask whether the nomination of a candidate at a special election to fill the vacancy caused by the death of Representative Omar Dames of the 105th district should be made by the county committee of St. Charles County or by the legislative committee of the 105th district.

We are enclosing opinion No. 89 rendered September 6, 1955, to William E. Tipton. Such opinion holds that candidates at a special election to fill a vacancy in the 10th senatorial district which was located wholly within Jackson County were to be nominated by the party senatorial committee of the 10th district and not by the county committee in whole or in part.

We believe such opinion to be applicable to the question presented and that under the provisions of Section 120.810 RSMo quoted in such opinion the nomination of a candidate to fill a vacancy at a special election in a legislative district in a county which contains more than one legislative district should be made by the legislative district committee and not by the county committee.

Opinion No. 89-1955 was withdrawn by this office only insofar as such opinion holds that nominations to fill a vacancy at a special election cannot be made by a petition of the electors. Therefore, the opinion is still valid insofar as party nominations are concerned and we believe, as stated above, that such opinion is directly in point.

We are enclosing opinion No. 256 rendered July 27, 1962, to Senator William B. Waters which rules as to the composition of a legislative district committee.

Very truly yours,

JOHN C. DANFORTH
Attorney General

August 29, 1969

OPINION LETTER NO. 371

Honorable John E. Parrish
Prosecuting Attorney
Camden County Courthouse
Camdenton, Missouri 65020

Dear Mr. Parrish:

This is in response to your request for an opinion regarding the following set of facts:

We understand that the Collector of Camden County sold at a tax sale 10 lots and that said lots were sold as a whole, the owner listed in the assessor's land tax books being set out as Tahoe Lake Estates. The purchase price paid for the ten lots was a total of \$750 with no breakdown attributable to any of the separate lots involved. It also appears that one of the owners of the lots was an individual not connected with the Tahoe Lake Estates and that this owner redeemed one of the lots by paying the back taxes and other charges on it to the Camden County Collector.

We further understand that the Collector issued a certificate of redemption to the real owner of the lot redeemed; and thereafter the purchasers, at the tax sale, declined to accept one-tenth of the total purchase price paid for the reason that he claims that the lot redeemed was more valuable than the remaining lots.

You have advised that the surplus was not distributed. You have not advised the proportion which the quantity of ground redeemed bears to the whole quantity sold.

In our view, Paragraph 3 of Section 140.390, RSMo 1959, applies. This subsection provides:

"Any person claiming a specific part of
any lands sold for taxes may redeem his

Honorable John E. Parrish

specific part by paying such proportion of the purchase money, interest, penalty and subsequent taxes as his quantity of ground shall bear to the whole quantity sold."

The amount of the purchase price to be refunded, therefore, for the lot redeemed is determined by the proportion which that specific part of land bears to the whole quantity sold.

For your further information, we are enclosing the following opinions:

Opinion No. 75, Rash, 4/4/35
Opinion No. 26, Faubion, 11.30/44

Yours very truly,

JOHN C. DANFORTH
Attorney General

DECLARATIONS OF CANDIDACY
FOR CONGRESS:

nullity and candidates who have attempted to file before such date must file after the effective date of the new law in order to be placed on ballots.

Declarations of candidacy for Congress filed prior to the effective date of new apportionment legislation are a

OPINION NO. 372

September 25, 1969

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This official opinion is issued in response to your request for a ruling concerning the following question:

Will declarations of candidacy for the United States House of Representatives filed before October 13, 1969, have to be refiled on or after that date, at which time the bill creating new Congressional districts becomes effective?

Enclosed you will find Attorney General's Opinion No. 61 issued December 27, 1961, to George H. Morgan. That opinion concerned the status of declarations filed prior to the effective date of the redistricting of senatorial and representative districts for the Missouri General Assembly made necessary by the 1960 census. At page 2 of that opinion it was said:

"...[A]ll of the senatorial and legislative districts in Jackson County went out of existence after the 1960 decennial census with the result that until new districts have been created as provided by law no person may validly file a declaration of candidacy for nomination for senator or representative from any such district."

We agree with such opinion and we are of the view that it is applicable to the question you pose. The 1967 apportionment law passed by the Missouri General Assembly was held unconstitutional and void by the United States Supreme Court in *Kirkpatrick v. Preisler*, 394 U.S. 526, 22 L.Ed.2d 519, 89 S.Ct. 1225 (1969). Earlier, however, the United States Supreme Court had expressly authorized the

Honorable James C. Kirkpatrick


holding of the 1968 congressional elections under the 1967 Act. 390 U.S., 939, 19 L.Ed.2d 1129, 88 S.Ct. 1053 (1968). The effect of the above ruling by the United States Supreme Court was to cause Missouri congressional districts to go out of existence after the 1968 election. This effect is analogous to that of 1960 decennial census discussed in the opinion quoted above. And the result would be the same--until new districts are created (the date the new law becomes effective), no person may validly file a declaration of candidacy for representative in the United States Congress for any district.

CONCLUSION

It is the opinion of this office that declarations of candidacy for representative in the United States Congress filed prior to the effective date of new congressional district legislation (Senate Bill 392, 75th General Assembly) are a nullity and candidates who attempted to file before such date must file a declaration of candidacy after the effective date of the new law in order to be placed on ballots.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 64
12-27-61, Morgan

Answer by letter--Boicourt

9-11-69

OPINION LETTER NO. 373

Honorable G. William Weier
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri 63050



Dear Mr. Weier:

This letter is in response to your request reading as follows:

Can a judge of the Circuit Court of Jefferson County, a second class county, appoint deputies under Section 57.220, RSMo 1959, without compensation? In the alternative, if compensation is necessary what would be the requirements therefor?

Section 57.220, RSMo 1959, provides that:

"The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office, provided however, such number of deputies appointed by the sheriff shall not be less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the county according to the last decennial census. Such deputies shall be appointed by the sheriff, but no appointment shall become

Honorable G. William Weier

effective until approved by the judges of the circuit court of the county. The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

You will note that the statute confers upon circuit judges in second class counties the power to determine the number of deputies necessary to aid the sheriff in proper discharge of the duties of his office and to approve the deputy appointees of the sheriff. The statute does not give circuit judges the power to appoint deputy sheriffs. At common law, circuit judges had no inherent power to appoint deputy sheriffs. See 80 C.J.S., Sheriffs and Constables § 22a(1)p. 188. Therefore, since the only two Missouri statutes concerning the appointment of deputy sheriffs in second class counties, §§ 57.119 and 57.220, give the power to appoint deputies to the sheriff, circuit judges have no such power.

The circuit judges do have authority, however, to determine the necessary number of deputies, approve the sheriff's appointments (such approval being a prerequisite to the effectiveness of such appointments) and to fix the salaries of deputy sheriffs by agreement with the sheriff.

Under § 57.220, RSMo 1959, the judges of the circuit courts are required to prepare and sign a statement as to the number of deputies allowed and their compensation. The sheriff is to file such statement together with signed approvals of appointments.

We would direct to your attention the fact that the statute so reads that the circuit judges, by agreement with the sheriff, are to fix the salaries of deputies. The use of the term "salary" would manifest an intention that periodic compensation be paid at regular intervals for the public services rendered or performed. 77 C.J.S. "Salary," pp. 553-555. "Salary" usually connotes weekly, monthly, or yearly periodic payments.

Honorable G. William Weier

The circuit judges could sign statements authorizing nominal compensation, for example, one dollar per year. It would be unadvisable, under the statute, to appoint deputies which are to serve without compensation, because of the language relating to the fixing of "salaries" indicating that recompense is to be made for the public services rendered by such deputies.

It is, therefore, our view that while circuit judges of Jefferson County cannot appoint deputy sheriffs, they can allow a larger staff of deputies to be appointed, approve the sheriff's appointment of additional deputies, and agree with the sheriff that only nominal, but some, compensation be paid the additional appointees.

Yours very truly,

JOHN C. DANFORTH
Attorney General

MUNICIPAL COURTS:
POLICE COURTS:
CITIES, TOWNS AND VILLAGES:
CHAIRMAN OF BOARD OF TRUSTEES
OF VILLAGE:
MAYOR:
ATTORNEY AT LAW:

House Bill 199 of the 75th General Assembly provides that as of October 13, 1969, in towns or villages in a county of the first class with a charter form of government and in cities of the fourth class in a county of the first class with a charter form of government:

(1) The authority of the chairman of such town or village to hear and determine offenses against the ordinances of such town or village is abolished and provides in lieu thereof for the election or appointment of a municipal judge who will have such jurisdiction; (2) The office of the chairman of such towns or villages is not otherwise affected by the provisions of said bill and said chairman need not resign and his office is not vacated; (3) the authority of the mayors or police judges of cities of the fourth class in such county to hear and determine offenses against the ordinances of said cities is abolished and provides in lieu thereof for the election or appointment of a municipal judge who will exercise the jurisdiction formerly exercised by such mayors or police judges. Only the municipal courts in a first class county with a charter form of government are affected by the provisions of House Bill 199 and the bill in no way affects the jurisdiction of personnel of the city courts in any of the towns, villages or cities in other counties.

OPINION NO. 376

September 18, 1969

Honorable Robert H. Branom
State Representative
2151 29th Street
Hillsdale, Missouri 63121

FILED

376

Dear Representative Branom:

This official opinion is issued pursuant to your request in which you ask whether the village chairman of a village in St. Louis County may continue to preside over trials on charges of violation of municipal ordinances after October 13, 1969, which is the effective date of House Bill 199 passed by the 75th General Assembly and approved by the Governor.

You indicate that your request relates to the Village of Breckenridge Hills which is in St. Louis County. This opinion, however, applies to all villages and fourth class cities in a county of the first class with a charter form of government. In view of the fact that St. Louis County is presently the only such county, we will refer to this classification as St. Louis County.

Honorable Robert H. Branom

We will also consider the application of House Bill 199 to towns, villages and fourth class cities outside St. Louis County.

Prior to the passage of House Bill 199, the village chairman of a town or village in Missouri served ex officio as a conservator of the peace and could try violations of municipal ordinances. The manifest purpose of House Bill 199 was to modify Section 80.260, RSMo 1959, so that towns and villages in St. Louis County will be obliged to select members of the bar as municipal judges. The Board of Trustees of such a village is obliged to do this by ordinance. It has no discretion. Such a municipal judge, once elected or appointed, has "exclusive original jurisdiction to hear and determine all offenses against the ordinances of the town" by the express terms of Section 80.260 as provided in House Bill 199.

The chairman of the Board of Trustees is to serve as the trier of charges of violation of ordinances in any village outside St. Louis County as in the past; but in St. Louis County, the municipal judge is to have this authority.

We do not see any necessity for a "resignation" on the part of the village chairman of the Village of Breckenridge Hills. His authority as set out in Sections 80.040 through 80.090 would remain as before. On the effective date of this act, the chairman would simply cease to have authority to hear charges of ordinance violations.

As for cities of the fourth class, prior Section 98.500 gave each city a choice. The mayor could preside over trials for violation of city ordinances, or an ordinance could provide for election of a "police judge." There was no requirement that the police judge be a member of the bar.

Section 98.500 continues as formerly in the case of cities of the fourth class outside St. Louis County with such violations tried by the mayor or the police judge as the mayor and the board of aldermen determine by ordinance.

Each section of Chapter 98 which is amended by House Bill 199 refers to "the mayor and police judge, or a municipal judge in a city of the fourth class in any first class county with a charter form of government. . . ." Section 98.500 terminates the jurisdiction of the mayor, or the police judge to hear and determine offenses against the ordinances in cities of the fourth class in St. Louis County and establishes the office of municipal judge. In such cities the municipal judge must be licensed to practice law unless he is holding the office of police judge on the effective date of the act, and may be either appointed or elected as provided by ordinance.

Honorable Robert H. Branom

CONCLUSION

It is the opinion of this office that House Bill 199 of the 75th General Assembly provides that as of October 13, 1969, in towns or villages in a county of the first class with a charter form of government and in cities of the fourth class in a county of the first class with a charter form of government:

(1) The authority of the chairman of such town or village to hear and determine offenses against the ordinances of such town or village is abolished and provides in lieu thereof for the election or appointment of a municipal judge who will have such jurisdiction;

(2) The office of the chairman of such towns or villages is not otherwise affected by the provisions of said bill and said chairman need not resign and his office is not vacated thereby;

(3) The authority of the mayors or police judges of cities of the fourth class in such county to hear and determine offenses against the ordinances of said cities is abolished and provides in lieu thereof for the election or appointment of a municipal judge who will exercise the jurisdiction formerly exercised by such mayors or police judges.

Only the municipal courts in a first class county with a charter form of government are affected by the provisions of House Bill 199 and the bill in no way affects the jurisdiction or personnel of the city courts in any of the towns, villages or cities in other counties.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent part.

JOHN C. DANFORTH
Attorney General

LIQUOR:
CORPORATIONS:

A corporation which holds a majority interest in various other corporations cannot, either personally or through its various subsidiaries, hold more than three retail liquor-by-the-drink licenses.

OPINION NO. 377

September 30, 1969

Honorable Harry Wiggins, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wiggins:

This is in response to your request for an opinion by our office, in which you seek our construction of §311.260, RSMo 1959, with respect to corporate structures. Specifically, you asked whether §311.260 would prohibit the organization of a holding corporation which would then acquire majority stock ownership of numerous other corporations in the State of Missouri and place liquor-by-the-drink licenses in series of three licenses under each subsidiary corporation, thereby having an interest in more than three liquor-by-the-drink licenses.

Section 311.260 provides:

"No person or corporation, or any employee, officer, agent, subsidiary, or affiliate thereof, shall have more than three licenses, nor be directly or indirectly interested in any business of any other person or corporation, or of any employee, officer, agent, subsidiary, or affiliate thereof, to sell intoxicating liquor, at retail by the drink for consumption on the premises described in any such license, nor shall any such intoxicating liquor be sold at retail by the drink for consumption at the place of sale at more than three places in this state, by any person or corporation, or by any employee, officer, agent, subsidiary or affiliate thereof."

Thus, it is clear ". . . that a retail dealer in liquor by the drink . . . may have not more than three licenses, nor shall he sell

Honorable Harry Wiggins

at more than three places in the state. . . ." State ex rel. Klein v. Hughes, 173 S.W.2d 877, 880 (Mo. 1943). Also, it is plain that this statute prohibits the holding of more than three licenses by any combination of a retail dealer in liquor-by-the-drink, whether he be person or corporation, and any employee, officer, agent, subsidiary, or affiliate thereof. Indeed, if this were not so, the phrase "or any employee, officer, agent, subsidiary, or affiliate thereof" would be meaningless. In addition, we think it clear that §311.260 prohibits a retail dealer in liquor-by-the-drink from having a direct or indirect interest in the business of any other person or corporation which has, either personally or through an employee, officer, agent, subsidiary, or affiliate, a license to sell liquor-by-the-drink for consumption on the premises.

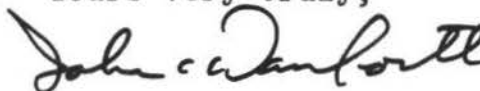
In the factual situation mentioned, there can be no question that each of the corporations, the majority of the stock of which is owned by another corporation, is a subsidiary of the holding corporation. See Baker v. Fenley, 128 S.W.2d 295, 298 (K.C.Mo. App. 1939). This being so, §311.260 would prohibit the holding corporation or any of its subsidiary corporations from holding more than three liquor-by-the-drink licenses, whether such licenses be issued individually to three subsidiary corporations or collectively to one subsidiary corporation.

CONCLUSION

Therefore, it is the opinion of this office that a corporation which holds a majority interest in various other corporations cannot, either personally or through its various subsidiaries, hold more than three retail liquor-by-the-drink licenses.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,



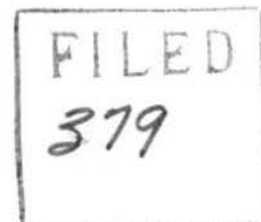
JOHN C. DANFORTH
Attorney General

Answer by letter-Blackmar

October 27, 1969

OPINION LETTER NO. 379

Honorable Gene McNary
Prosecuting Attorney
St. Louis County Court House
Clayton, Missouri 63105



Dear Mr. McNary:

This letter is in response to your request for an opinion on: (1) whether the federal statute, 23 U.S.C. 127, is properly incorporated by reference in Section 304.180, RSMo Supp. 1967, and (2) whether Section 4 of this statute provides legal sanctions for a violation of the overload limits set by Section 23 U.S.C. 127. On inquiry, we are also informed that you are interested in an opinion as to whether Section 4 of Section 304.180, RSMo Supp. 1967, provides legal sanctions for a violation of the overload limits set by 23 U.S.C. 127 when prosecution is for a load within the limits of Section 304.190, RSMo Supp. 1967.

In response to questions 1 and 2, we are of the opinion that the limits set by the federal statute and the state statute, Section 304.180, are the same; and therefore, we see no need to consider those questions.

We see no way that Section 4 of Section 304.180 can be construed to make unlawful loads expressly permitted by Section 304.190.

Yours very truly,

JOHN C. DANFORTH
Attorney General

BAIL BONDS:

A member of the Selective Service Board of Jefferson County is not disqualified by his membership therein from acting as a professional surety on bail bonds under Supreme Court Rule 32.14.

September 25, 1969

OPINION NO. 381

Honorable William T. Brooking, Jr.
Assistant Prosecuting Attorney
Jefferson County Courthouse
Hillsboro, Missouri 63050

Dear Mr. Brooking:

This official opinion is issued in response to your request for a ruling asking the following question:

Is a member of the Selective Service Board of Jefferson County qualified to act as a professional surety on bail bonds under provisions of Supreme Court Rule 32.14?

Supreme Court Rule 32.14 is worded thusly:

"An individual shall not be accepted as a surety on any bail bond taken under these Rules unless he possesses the following qualifications:

1. He shall be a reputable person, at least twenty-one years of age and a bona fide resident of the State of Missouri.

2. He shall not have been convicted of any felony under the laws of any state or of the United States.

3. He shall not be an attorney-at-law, a peace officer, a constable or a deputy constable.

Honorable William T. Brooking, Jr.

4. He shall not be an elected or appointed official or employee of the State of Missouri or any county or other political subdivision thereof.

5. He shall have no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States."

We assume that your question is directed at subsection (4) of the Rule concerning the disqualification to act as bail bond surety attached to officials or employees of the State of Missouri, in a county or other subdivision thereof. This subsection would not disqualify a member of a local Selective Service Board from acting as a professional bail bond surety, because the members of such boards are not employees of the State of Missouri or any county or political subdivision thereof. To the contrary, 50 U.S.C.A. App. § 460 (b)(3) provides for the creation of local Selective Service Boards by the President which shall become integral parts of the Selective Service System, an agency within the executive branch of the federal government.

As Supreme Court Rule 32.14 reads so that, "An individual shall not be accepted as a surety on any bail bond taken under these Rules unless he possesses the following qualifications" (emphasis added), the qualifications included thereunder, in conjunction with Rule 32.15 as regards solvency and Rule 32.16 concerning the filing of an affidavit, must be considered to be complete. If the member of the Selective Service Board of Jefferson County in question is qualified under the other subdivisions of Rule 32.14 and is solvent under Rule 32.15 and if he files an affidavit in compliance with Rule 32.16, his membership in said Board is not disqualifying under subsection (4) of Rule 32.14.

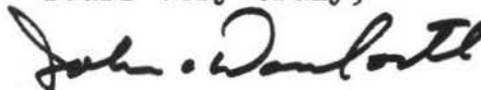
CONCLUSION

Therefore, it is the opinion of this office that a member of the Selective Service Board of Jefferson County is not disqualified by his membership therein from acting as a professional surety on bail bonds under Supreme Court Rule 32.14.

Honorable William T. Brooking, Jr.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

August 28, 1969

OPINION LETTER NO. 384
Answered by Letter - Bartlett

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Dear Commissioner Wheeler:

In accordance with your request of August 6, 1969, we have reviewed the Missouri State Board of Education's Application for Program Grant for Migratory Children (Fiscal Year 1970). This grant is being submitted under Title I of the Elementary and Secondary Education Act of 1965, PL 89-10, as amended by PL 89-750.

In addition to the Elementary and Secondary Education Act of 1965, as amended by PL 89-750, and the Regulations pursuant thereto, our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092 RSMo Supp. 1967.

Based on the foregoing, we hereby certify that the Missouri State Board of Education has authority under State law to perform the duties and functions of a "State educational agency" as defined in Title I of PL 89-10 (20 U.S.C. Section 244) including those arising from the assurances set forth in the Application and that the State Board of Education has the authority to submit and administer the special educational programs and projects for migratory children as set forth in the Application.

This Opinion Letter constitutes our official certification and should be inserted in the appropriate place in each copy of the Application. We are returning herewith two copies of the Application.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SHERIFFS:
COMPENSATION:
FEES:
LEGISLATION:
AUDITOR:

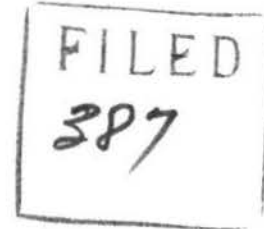
Senate Bill No. 165 of the 75th General Assembly relating to sheriffs of class three and class four counties provides for compensation for such sheriffs which is in addition to other compensation

now provided by law and is effective October 13, 1969. Senate Bill No. 165, however, limits the total compensation of all sheriffs of counties of the third class with an assessed valuation of less than \$20 million to \$10,000 per year, excluding mileage.

OPINION NO. 387

October 9, 1969

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
P. O. Box 301
Maysville, Missouri 64469



Dear Mr. Paden:

This official opinion is issued in response to the request contained in your letter dated August 26, 1969.

The question presented is whether or not Senate Bill No. 165, 75th General Assembly of the State of Missouri, entitled "AN ACT Relating to sheriffs", increases the compensation payable to sheriffs of third class counties above that already provided in Sections 57.390, 57.405 and 57.430, RSMo 1959.

Apparently, there is some feeling that moneys to be paid sheriffs under Senate Bill No. 165 are to be paid in lieu of and not in addition to the compensation and expenses provided in the sections of the statutes to which reference has been made. Senate Bill No. 165 was passed by the General Assembly and signed by the Governor on August 11, 1969, and provides as follows:

"1. The sheriff in counties of the third class shall on January first of each year and every three months thereafter file with the circuit court of the county a report on the conditions of the county jail, the number of prisoners confined in the jail, together with recommendations relating to its operation.

Honorable Robert B. Paden

"2. In addition to the salary, travel expenses, reimbursement expenses, and any other compensation now provided by law, the sheriff in each county of the third class, for the performance of these duties, shall receive the following sums per year: In counties having a population of less than seven thousand five hundred, the sum of six thousand eight hundred dollars; * * * payable in twelve equal monthly installments out of the county treasury, by warrants drawn by the county court upon the county treasury.

"3. In counties of the third class after the passage of this act the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process.

* * *

"Notwithstanding other provisions of this act the total compensation of sheriffs of counties of the third class with an assessed valuation of less than \$20 million shall not exceed \$10,000 excluding mileage."

The question should be considered in the light of Article VII, Section 13, Missouri Constitution, which limits increases in compensation under certain circumstances. The constitutional provision is as follows:

"Limitation on increase of compensation and extension of terms of office. - - The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

The express language of Senate Bill No. 165 is that the compensation provided therein shall be "in addition to the salary, travel expenses, reimbursement expenses and any other compensation now provided by law." This language, however, is limited somewhat by the provisions of the bill requiring the sheriff to pay all fees collected by him in civil matters, and which were previously retained by him, into the county treasury except charges for mileage in serving civil process.

Section 57.390, RSMo 1959, relating to class three counties,

Honorable Robert B. Paden

provides compensation for the arrest, care and handling of persons accused of crime. It makes no provision for filing reports on the conditions of the county jail as contemplated by the Bill. Section 57.405 allows additional compensation to sheriffs of class three and class four counties. Section 57.430 allows sheriffs and their deputies actual and necessary expenses in connection with serving warrants or other criminal process, and investigation of persons accused of or convicted of criminal offenses. It will be observed that none of these statutes relate to the filing of county jail condition reports.

Section 57.102, RSMo Supp. 1967, requires that sheriffs in second class counties file periodic reports on the condition of the county jail, and the number of prisoners confined in the jail together with recommendations relating to its operation. Senate Bill No. 165 imposes the same obligation on sheriffs of counties of the third and fourth classes. The duties thus imposed by Senate Bill No. 165 are additional duties for which additional compensation is to be paid.

Under these circumstances, there is no constitutional objection inasmuch as additional duties are imposed upon sheriffs of third class counties by the new statute. Likewise, Senate Bill No. 165 did not repeal any of the prior statutory enactments relating to compensation of sheriffs of third class counties.

Inasmuch as DeKalb County, Missouri has an assessed valuation exceeding \$20,000,000, the limitation on total compensation contained in the last paragraph of Senate Bill No. 165, quoted above, does not apply. The population of the county is less than 7,500. Therefore, the additional compensation for such sheriff is \$6,800 per year.

We note that the bill does contemplate that the report be filed on January first of each year and every three months thereafter. Presumably, however, the legislature considered that the preparation of the report would require that the sheriffs of counties of the third class perform work prior to January 1, 1970. In our view, Senate Bill No. 165 will become effective October 13, 1969, and the compensation therein provided will be pro-rated from October 13, 1969, to the end of the year.

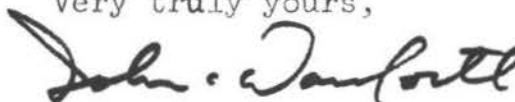
CONCLUSION

It is therefore the opinion of this office that Senate Bill No. 165 of the 75th General Assembly relating to sheriffs of class three and class four counties provides for compensation for such sheriffs which is in addition to other compensation now provided by law and is effective October 13, 1969. Senate Bill No. 165, however, limits the total compensation of all sheriffs of counties of the third class with an assessed valuation of less than \$20 million to \$10,000 per year, excluding mileage.

Honorable Robert B. Paden

The foregoing opinion, which I hereby approve, was prepared by
my assistant John E. Park.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

October 23, 1967

FILED NO. 389 - 1969

The Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Jim:

As you will recall, on April 25, 1967, by letter, you asked the following question:

"Is it your opinion that Chapter 356 of the Missouri Revised Statutes, 1959, is meant to exclude those named professions from incorporating under Chapter 351 of the Missouri Revised Statutes, 1959?"

We subsequently discussed the matter on the phone and decided that a letter would be sent, in answer, rather than an opinion.

Thereafter, on May 3, 1967, a letter was sent stating, in part, that:

". . . those professions listed under Chapter 356 were meant to be excluded from the provisions of Chapter 351 . . ."

As a result of my letter we received comment from various attorneys to the effect that we were in error as to our statement to you in our letter of May 3, 1967.

The matter was reviewed and I'm convinced that we were in error.

The Honorable James C. Kirkpatrick
October 23, 1967
Page 2

This office is of the opinion that Chapter 356, RSMo, was intended by the legislature to be an enabling act and not a regulating act, in conjunction with Chapter 351, RSMo.

I believe there is very little doubt that professional persons might incorporate either under the General Business Corporation Act, if their licensing laws permit, or under Chapter 356 if they so desire.

I certainly apologize for any inconvenience, to say the least, that may have occurred because of our error.

If you have any further questions please contact me.

I assume that this letter will replace the aforementioned letter containing the erroneous information.

Respectfully,

NORMAN H. ANDERSON
Attorney General

NHA/hw

cc: Wm. A. Boles
Suite 209, 408 Olive St.
St. Louis, Mo. 63102

Hon. James E. Godfrey
Room 1000, 418 Olive St.
St. Louis, Mo.

Hon. Jack J. Schramm
Room 574, 7701 Forsyth Blvd.
Clayton, Mo. 63105

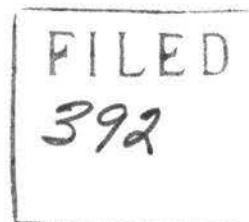
CRIMINAL COSTS:

The state shall pay from the criminal cost appropriations for the cost of "a transcript" of criminal proceedings where the defendant is sentenced to five years or more in the penitentiary when the transcript is required by the judge, but that there is no authority for the state to pay for a copy thereof when required by the judge at the conclusion of the case.

OPINION NO. 392

October 14, 1969

Honorable Brendan Ryan
Circuit Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri



Dear Mr. Ryan:

In your letter of August 28, 1969, you requested an opinion from this office as follows:

"For some time it has been the practice of the judges of the St. Louis Circuit Court to require the court reporter to prepare a transcript - consisting of an original and one copy - in all criminal cases in which defendants enter pleas of guilty and are given sentences of five years or more. Such original and copy are then placed in the court file as part of the permanent record. This practice originated out of the judges' experiences with the multiplicity of Sup. Crt. Rule 27.26 Motions that have been filed in recent years and discussions and suggestions pertinent thereto that were made at some of the judicial conferences.

"In most of the Rule 27.26 proceedings the defendants are indigent, and their attorneys - appointed counsel usually - requests a transcript of the proceedings at the time of the defendant's plea. The ready availability of the copy of the transcript has saved much time and avoided many difficulties.

"The Comptroller's Office pays for the original but declines to pay for the carbon copy of the transcript.

Honorable Brendan Ryan

"An official opinion is respectfully requested as to whether or not, under the provisions of Section 485.100 RSMo Supp. 1965 the State should pay for the carbon as well as for the original transcript."

Section 485.100, RSMo Supp. 1967, to which you refer provides in part:

" . . . Any judge, in his discretion, may order a transcript of all or any part of the evidence or oral proceedings, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper. In criminal cases where an appeal is taken by the defendant, and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper; and in such case the court reporter shall furnish three transcripts in duplication of the notes of the evidence, for the original of which he shall receive forty-five cents per legal page and for the copies fifteen cents per page." (Emphasis added)

The State of Missouri is now reimbursing the counties for the cost of "a transcript" ordered under Section 485.100, RSMo Supp. 1967, because the state is liable under Section 550.020(1), RSMo 1959, which provides:

" . . . in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, . . . the state shall pay the cost, . . ."

Moreover, the last clause of Section 550.020(1), RSMo 1959, provides that the state shall not pay costs "incurred on behalf of defendant."

It is apparent from the facts as outlined in your letter that the carbon copy of the transcript for which payment is sought is being prepared for the benefit of the defendant. Therefore, there is no statutory authority under Section 550.020, RSMo 1959, which allows payment by the state.

Honorable Brendan Ryan

CONCLUSION

It is therefore the opinion of this office that the state shall pay from the criminal cost appropriations for the cost of "a transcript" of criminal proceedings where the defendant is sentenced to five years or more in the penitentiary when the transcript is required by the judge, but that there is no authority for the state to pay for a copy thereof when required by the judge at the conclusion of the case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

JOHN C. DANFORTH
Attorney General

Answer by Letter - Klaffenbach

September 23, 1969

OPINION LETTER NO. 397

Mr. James E. Schaffner, Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This letter is in response to your opinion request concerning an interpretation of Senate Bill No. 241.

More specifically, you inquire how the distribution of the cigarette tax funds shall be made and to whom such distribution shall be made.

Senate Bill No. 241 of the 75th General Assembly is an amendment to Section 210.320 of the Revised Statutes of 1959.

The amended section reads in full as follows:

"The county court in any such county, or the circuit court en banc in any first class county with all or part of a city of 350,000 or more population, shall make all rules and regulations for the government of such places of detention, appoint officers and attendants, including teachers, prescribe their duties and fix their compensation. The expense of maintaining such places of detention, including the compensation of officers and employees thereof, shall be paid out of any funds available for the purpose, as said county court may deem proper; provided, no portion of the special road fund shall be appropriated for this purpose.

Mr. James E. Schaffner

"In any first class county with all or the greater part of a city of 350,000 or greater, to help defray the expenses of such places of detention and other children's services and for no other purposes, the county court or other legislative authority is hereby authorized to impose a tax on the sale of cigarettes made of tobacco or any substitute for tobacco, not to exceed two and one-half mills per cigarette sold in said county.

"The rate of taxation shall not be greater than the amount required for children's services.

"The county cigarette tax shall be collected by the division of collection of the state department of revenue. The division shall each day retain, from the county tax collected, one per cent of the amount collected and deposit that amount in the state general revenue fund to help defray the cost to the state of collecting and distributing this tax.

"The tax shall be paid and stamps affixed in the same manner as is provided by chapter 149 RSMo, for the state cigarette tax; except that no discount shall be given any wholesaler for affixing stamps or making reports required by the division.

"The director of revenue of this state shall promulgate reasonable and necessary regulations for the collection of this tax and any violation of such regulation is a misdemeanor and any person convicted of such a misdemeanor shall be punished by law.

"The budget for the operation of such places of detention shall be fixed by the Circuit Court en banc in counties of the first class with all or part of a city of 350,000, or more, population. Such budget shall be filed with the County Court at the same time as, and becomes a part of, the budget of the Circuit Court en banc for the performance of its other duties and functions."

Mr. James E. Schaffner

Throughout this section, the emphasis indicates that the tax imposed is a county tax and for county purposes. It is clearly provided that the division of collection of the State Department of Revenue acts only as a collecting agency of the "county cigarette tax" and to defray such costs, the division of collection receives one per cent which is deposited in the state general revenue fund.

We also note that the budget for the operation of such places of detention, for which such funds are used, would be fixed by the Circuit Court en banc in counties of the first class with all or part of a city of 350,000, or more, population and be filed with the County Court at the same time as, and becomes a part of, the budget of such Circuit Court en banc for the performance of its other duties and functions. The expenses of the Circuit Courts, of course, are paid out of the county treasury. Section 476.270, RSMo 1959.

The county treasurer is the proper officer to receive such moneys from the division of collection, less the one per cent deposited in the state general revenue fund, and to disburse the same on warrants drawn by order of the county court. Section 54.100, RSMo 1959.

We further note that the one per cent of the amount retained to defray the cost of collection and distribution of the tax is to be retained "each day." It follows that the legislature intended the distribution of the balance to the county treasury be on a day-to-day basis.

Yours very truly,

JOHN C. DANFORTH
Attorney General

NOTE: This opinion letter when sent out should always
be accompanied by Op. No. 231 - 1971.

Answer by letter-Jones

November 20, 1969

OPINION LETTER NO. 398

Mr. George W. Flexsenhar, Director
Division of Industrial Inspection
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Flexsenhar:

This is to acknowledge receipt of your letter of recent date with enclosures requesting an opinion from this office as to whether two rest periods 15 minutes each and a lunch period of 30 minutes are to be counted as "hours worked" within the meaning of Section 290.040, RSMo 1959.

The wording of the above statute prohibits the employment of females in enumerated types of businesses for a longer period than 9 hours during any one day and more than 54 hours during any one week. The assumption is made that the statute is applicable to the business of the company in question.

With these principles in mind, the enclosures that you have provided us indicate that the policies for consideration are as follows:

"As noted previously our employees are paid for eight hours each shift. However, during each eight hour shift, they are given two fifteen minute breaks and one thirty minute lunch period (with pay) during which times they may leave their work areas and go to the locker rooms, plant cafeteria or step outside the building if they so desire. When a female's turn for over-time occurs we allow her an opportunity to work an additional two hours beyond the end of her shift if she elects to do so, is qualified and is physically capable of performing the job.

Mr. George W. Flexsenhar

This, of course, would show as ten hours of pay on her time card but deducting the one hour of break and lunch time she would be working only nine hours. We use this same reasoning in determining when a female has reached fifty-four hours in a week."

We will first consider the issue of two rest periods of 15 minutes each. In the case of *Aeromotive Metal Products, Inc. v. Wirtz*, 312 F.2d 728 (C.A. 9, 1963), it was held that a finding that a 15 minute mid-morning break period did not increase production or reduce mistakes or cut down on absenteeism or employee turnover but that it improved the employer-employee relationship supported a conclusion that a rest period which was not sufficiently long to enable employees to make beneficial personal use of the time, was predominantly for the benefit of the employer and had to be counted as hours of employment. The case of *Mitchell v. Greinetz*, 235 F.2d 621, 13 W.H. Cases 3 (C.A. 10, 1956) reveals that judicial knowledge was taken of the fact that coffee breaks or short rest periods are rapidly becoming an acceptable part of employment generally. An interpretative bulletin issued by the wage and hour administrator indicates that rest periods of short duration running from 5 minutes to about 20 minutes are common in industry, promote the efficiency of the employee and must be counted as hours worked. See Interpretative Bulletin, Title 29, Part 785, Code of Federal Regulations, Section 785.18. In view of these authorities, we are persuaded that two rest periods of 15 minutes each, should be counted as hours worked within the meaning of Section 290.040, RSMo 1959.

We will now consider the issue of a lunch period of 30 minutes. In the case of *Neal v. Braughton*, 111 F.Supp. 775 (W.D. Ark. 1953), the court held that if a time designated as a lunch period is spent predominantly for the employer's benefit, it is working time for purposes of the Fair Labor Standards Act, but if the employee is free to leave the premises and do as he pleases during the lunch period, such time is not working time within the Act. For a similar interpretation see *Culkin v. Glenn L. Martin Nebraska Co.*, 97 F.Supp. 661 (D. Neb. 1951), aff'd 197 F.Supp. 661 (C.A. 8, 1952), cert. denied 344 U.S. 866 (1952), rehearing denied 344 U.S. 888 (1952). An interpretative bulletin issued by the wage and hour administrator indicates that bona fide meal periods are not worktime. It is further stated that the employee is not relieved from work if he is required to perform any duties, whether active or inactive, while eating. See Interpretative Bulletin, Title 29, Part 785, Code of Federal Regulations, Section 785.19. An analysis of the factual situation reveals that during their lunch periods the employees are allowed to leave their work areas and go to the locker rooms, plant cafeteria or step outside the building if they so desire. It is therefore our view that the employees are able to use the time effectively for their own purposes and that a meal period of 30 minutes

Mr. George W. Flexsenhar

is not to be counted as hours worked within the meaning of Section 290.040, RSMo 1959.

To summarize our views in regard to the above, it is our belief that within the meaning of Section 290.040, RSMo 1959, two rest periods of 15 minutes each are to be counted as hours worked, but that a meal period of 30 minutes is not to be counted as hours worked where the employee is free to follow pursuits of a purely private nature. It is therefore our opinion that a company which employs women for 10 hours a day with two rest periods of 15 minutes each, and a lunch period of 30 minutes, is in violation of Section 290.040, RSMo 1959.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CIRCUIT CLERKS: With respect to House Bill 119 of the 75th
COMMON PLEAS COURTS: General Assembly relating to the total
RECORDERS OF DEEDS: compensation formula for the offices of
COMPENSATION: recorder of deeds, circuit clerks, circuit
FEES: clerk-ex officio recorder of deeds, in cer-
LEGISLATION: tain counties, and clerks of the common
AUDITOR: pleas courts, (1) The present full compen-
sation of the recorder of deeds in class
two counties can be readily ascertained; and if the compensation
provided by House Bill 119 exceeds that provided by statutes
applicable before the enactment of House Bill 119, such new com-
pensation cannot be paid during the present term of office. (2)
Circuit clerks of class two, three and four counties and the
recorder of deeds in counties of the third class and clerks of
the courts of common pleas will not receive the compensation pro-
vided by House Bill 119 during their present term if the compen-
sation of such officers provided for by such bill is greater than
the present statutory salaries of such officers. The additional
compensation provided for the clerk of the Hannibal Court of
Common Pleas under the provisions of Section 483.455 of House Bill
No. 74 is also considered in computing his present salary.

OPINION NO. 399

October 9, 1969

Honorable William S. Brandom
Prosecuting Attorney
Clay County Courthouse
Liberty, Missouri 64068



Dear Mr. Brandom:

This is in response to an opinion request from your office concerning the effective date of House Bill No. 119 of the 75th General Assembly.

House Bill No. 119 repeals various sections relative to the duties and compensation of circuit clerks, circuit clerks-ex officio recorder of deeds, recorder of deeds in certain counties and clerks of the courts of common pleas and enacts in lieu thereof certain sections relative to the duties of such officers and establishes a pay formula for such individuals based upon population and assessed valuation.

The question revolves about the interpretation of the constitutional provisions contained in Section 13 of Article VII of the Missouri Constitution which states:

"The compensation of state, county and
municipal officers shall not be increased

Honorable William S. Brandom

during the term of office; nor shall the term of any officer be extended."

In State ex rel Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106 (1917), the Supreme Court assumed, but did not hold expressly that the circuit clerk was an officer within the meaning of this statute. This assumption was noted in State ex rel Webb v. Pigg, 363 Mo. 133, 249 S.W.2d 435 (1952), a case involving a clerk of the court of appeals. In the latter case, the court noted that the circuit clerk had duties involving more discretion than the clerk of the court of appeals; and although they held that the clerk of the court of appeals is not a state officer within the meaning of this section, the holding therein does not declare the status of the clerk of the circuit court.

It is our view that the officers herein mentioned are officers within the meaning of Section 13 of Article VII of the Constitution.

With respect to the effective date of laws generally, Section 29, Article III of the Constitution provides:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Section 1.130, RSMo 1959, provides:

"A law passed by the general assembly takes effect ninety days after the adjournment of the session at which it is enacted; but if the general assembly recesses for thirty days or more, it may prescribe by joint resolution that laws previously passed and not effective take effect ninety days from the beginning of the recess, subject to the following exceptions:

"(1). A law necessary for the immediate preservation of the public peace, health or

safety, which emergency is expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house the vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, takes effect as of the hour and minute of its approval by the governor; which hour and minute may be indorsed by the governor on the bill at the time of its approval;

"(2). In case the general assembly, as to a law not of the character herein specified, provides that the law takes effect on a date in the future subsequent to the expiration of the period of ninety days herein mentioned the law takes effect on the date thus fixed by the general assembly;

"(3). In case the general assembly provides that any law takes effect as provided in subdivision (1) of this section, the general assembly may provide in such law that the operative date of the law or parts of the law takes effect on a date subsequent to the effective date of the law."

We note that House Bill 119 contains no emergency provision nor does it specifically declare an effective date. It will therefore become effective on October 13, 1969. If it does, in fact, provide an increase in compensation for any officers during their term of office to the extent that the particular compensation of the officers involved is increased by the provisions of the act, it will become effective as to such officers upon the end of the present term of such officers.

At present, the mode of compensation to these officers varies. The present salary of the recorder of deeds in class two counties is the total compensation of such officer and therefore may be compared with compensation such officer will receive under the Bill. Section 59.225, RSMo Supp. 1967. However, with respect to the other officers, we note that the fixed compensation that they presently receive is not their present full compensation. That is, the circuit clerks of class two, three and four counties receive in addition to fixed allowances all fees earned in cases of change of venue from other counties. Section 483.560, RSMo 1959;

Honorable William S. Brandom

Section 483.315, RSMo 1959; Section 483.330, RSMo Supp. 1967; Section 483.335, RSMo Supp. 1967; Section 483.370, RSMo 1959. In addition, the circuit clerk-ex officio recorder of deeds in counties of the third class are presently permitted to retain non-accountable fees for services performed with respect to the lists of veterans and copies of discharges. Section 59.490, RSMo Supp. 1967.

It further appears with respect to the clerks of the Courts of Common Pleas at Hannibal and Cape Girardeau that said clerks are entitled to fixed allowances under the provisions of Sections 483.425, RSMo Supp. 1967, and 483.461, RSMo Supp. 1967, and under the provisions of Section 483.455 of House Bill No. 74 of the 75th General Assembly (Opinion No. ~~434~~, 1969, Holman) effective October 13, 1969, relating to additional compensation for the clerk of the Hannibal Court of Common Pleas. In addition, such clerks are entitled to retain fees earned in cases of change of venue for the reason that the term "circuit court" is intended generally to include "courts of common pleas." Section 1.110, RSMo 1959. Section 483.560, RSMo 1959, which pertains generally to counties of classes two, three and four excepts fees collected in cases of change of venue from other counties by circuit clerks from those fees payable monthly into the county treasury. This section is, therefore, applicable to fees of clerks of the courts of common pleas earned in cases of change of venue to such courts.

Further, Section 59.490, RSMo Supp. 1967, presently permits the recorder of counties of the third class to collect a non-accountable fee for services performed with respect to the list of veterans and the copies of discharges.

The present compensation for such officers who are thus now entitled to receive non-accountable fees in addition to fixed allowances is not readily ascertainable.

We conclude that the present compensation for the recorder of deeds in class two counties is fixed and certain; and whether or not the compensation of any particular recorder in such class county is increased by House Bill 119, is solely a matter of mathematical calculation.

Insofar as concerns the effective date of the new total compensation schedule for third class county recorders, circuit clerks of the class two, three and four counties and the clerks of the common pleas courts, it is our view that any increase over the present salary provisions, including the compensation provided for the clerk of the Hannibal Court of Common Pleas pursuant to Section 483.455 of House Bill No. 74, disregarding non-accountable fees, is not effective until the end of the term of office of such officers. We feel that this view is supported by the holding of the Supreme Court of Missouri in Folk vs. City of St.

Honorable William S. Brandom

Louis, 157 S.W. 71, at l.c. 76 (1913):

" . . . the mere discontinuance of the right to collect uncertain fees cannot afford a satisfactory reason for raising a specific salary payable out of the public treasury. To do so would be to fritter away the salutary provisions of section 8, art. 14, of the Constitution of Missouri by pretending to take away from an officer fees which he had not, and might never earn, and give him a block of solid cash out of the public treasury in lieu thereof."

CONCLUSION

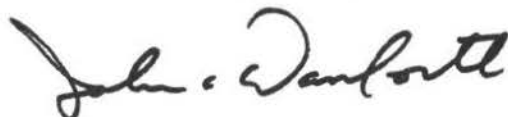
It is therefore the opinion of this office with respect to House Bill 119 of the 75th General Assembly relating to the total compensation formula for the offices of recorder of deeds, circuit clerks, circuit clerk-ex officio recorder of deeds, in certain counties, and clerks of the common pleas courts that:

(1) The present full compensation of the recorder of deeds in class two counties can be readily ascertained; and if the compensation provided by House Bill 119 exceeds that provided by statutes applicable before the enactment of House Bill 119, such new compensation cannot be paid during the present term of office.

(2) Circuit clerks of class two, three and four counties and the recorder of deeds in counties of the third class and clerks of the courts of common pleas will not receive the compensation provided by House Bill 119 during their present term if the compensation of such officers provided for by such bill is greater than the present statutory salaries of such officers. The additional compensation provided for the clerk of the Hannibal Court of Common Pleas under the provisions of Section 483.455 of House Bill No. 74 is also considered in computing his present salary.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

SCHOOLS:

STATE AID:

SCHOOL TRANSPORTATION:

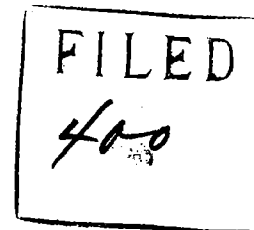
If a school board reasonably concludes that a student resides more than one mile from school via the shortest reasonably suitable route

for pedestrian traffic and, furthermore, decides to provide public transportation for that student, the school district is entitled to state aid for the transportation of that pupil computed in accordance with Section 163.161, Senate Bills No. 1, 185 and 215, 75th General Assembly.

OPINION NO. 400

November 11, 1969

Honorable Joseph H. Frappier
State Representative, 24th District
2335 Hummingbird Drive
Florissant, Missouri 63033



Dear Representative Frappier:

This letter is in response to your request for an opinion on a question pertaining to the conclusion reached by this office in Section II of its Opinion 21 to Commissioner Hubert Wheeler, Commissioner, Department of Education, dated March 18, 1969. Specifically, your question was as follows:

"Please consider the following set of circumstances:

"I. A student resides less than one mile from school via the most direct public route.

"II. The school board determines that the most direct route is hazardous and not reasonably suitable for pedestrian traffic.

"III. The alternate route to school is reasonably suitable for pedestrian traffic but is more than one mile from home to school.

"IV. The school board decides to provide transportation to the children.

"Should the State Department of Education participate in the expense of transporting these children on the basis that the shortest route, considered by the Board to be reasonably suitable for pedestrian traffic, is in excess of one mile from the home to the school?"

Honorable Joseph H. Frappier

We assume your question is whether the school district should receive state aid for a pupil furnished public transportation pursuant to the circumstances set forth in your letter.

Section 163.161, as amended in 1969 (see Senate Bills Nos. 1, 185 and 215), provides the basis for furnishing state aid in transporting public school pupils and the method of computing it.

"1. Any school district which makes provision for transporting pupils as provided in sections 167.231 and 167.241, RSMo, shall receive state aid for the ensuing year for such transportation on the basis of the number of public school pupils transported per mile traveled as follows:

Pupils transported per mile traveled	Allowance per pupil per month
0 to 2.9	\$8.00
3.0 to 3.9	5.00
4.0 or more	4.00

The number of pupils transported per mile traveled is determined by dividing the average daily number of pupils transported one mile or more by the total miles of approved bus routes. The amount of state aid is determined by multiplying the allowance per pupil per month by the average daily number of pupils transported and multiplying the sum thus derived by the number of months the pupils are transported. Both resident and nonresident pupils shall be counted alike in determining the pupils transported per mile traveled. In no event shall such state aid per pupils exceed actual cost per pupil.

"2. The state board of education shall approve all bus routes and determine the total miles each district should have for the effective and economical transportation of the pupils."

An analysis of this section as it applies to your inquiry raises the following questions:

1. Did the school district in question make provision for transporting the pupil in question as provided in Section 167.231, RSMo Supp. 1967?

Honorable Joseph H. Frappier

2. If so, what is the meaning of "pupils transported per mile traveled" as the phrase is used in Section 163.161?

3. In view of the answers to questions 1 and 2, is the school district in question entitled to state aid for transporting the student who is the subject of your inquiry?

1. Presumably the School Board in Question Complied
With §167.231 in Providing Transportation

In Opinion 21 of this office dated March 18, 1969, a copy of which is enclosed herewith, we conclude that the determination of the shortest route which is suitable for normal pedestrian traffic is within the sound discretion of the local school board. For the purposes of this opinion, we assume that the school board in question reasonably concluded that the shortest reasonably suited route for pedestrian traffic was more than one mile from home to school. Based on (1) this assumption, (2) the fact as stated in your letter that this board subsequently decided to furnish the child transportation, and (3) the interpretation of Section 167.231, RSMo Supp. 1967, as set forth in Opinion 21, we conclude that provision has been made for transporting this pupil as provided in Section 167.231. Therefore, the condition precedent to any school district receiving any state aid for the transporting of any pupil has been satisfied.

2. Determining the Number of
"Pupils Transported per mile Traveled"

Section 163.161 provides that if a school district makes provision for transporting pupils as provided in Section 167.231, it ". . . shall receive state aid for the ensuing year for such transportation on the basis of the number of public school pupils transported per mile traveled . . ."

The method of determining the number of pupils transported per mile traveled is set forth in the following sentence of Section 163.-161:

" . . . The number of pupils transported per mile traveled is determined by dividing the average daily number of pupils transported one mile or more by the total miles of approved bus routes. . . ." (emphasis supplied)

The phrase "transported one mile or more" is susceptible of at least two interpretations. It could mean that if a pupil is actually on the bus for a distance greater than one mile he should be included in the computation. Another interpretation is that a pupil is transported one mile or more only if the distance from his home to school

Honorable Joseph H. Frappier

exceeds one mile. Implicit in the second interpretation is the question -- should this distance be measured by the shortest reasonably safe pedestrian route or by the shortest vehicular route from the home to school?

Contemporaneous and practical construction of ambiguous statutes over long periods of time by the officers charged with construction and administration thereof may be considered by the courts in construing them. Lemasters v. Willman, 281 S.W.2d 580 (St.L.Ct.App. 1955). We are advised by the State Department of Education that for a number of years it has measured this distance over the nearest traveled route from the home of the pupil in question to the school. For this opinion, we will adopt that construction. Therefore, the distance a pupil is transported for the purpose of computing the number of pupils transported per mile traveled in Section 163.161 should be measured over the nearest traveled route from the pupil's home to school were the bus to go directly between the two points.

3. The School District in Question is Entitled to
Receive State Aid for the Pupil in Question

After determining the number of pupils transported per mile traveled, the amount of state aid under Section 163.161 is determined:

" . . . by multiplying the allowance per pupil per month by the average daily number of pupils transported and multiplying the sum thus derived by the number of months the pupils are transported. . . ." (emphasis supplied)

Significantly, the phrase "one mile or more" does not follow "number of pupils transported." We believe "number of pupils transported" indicates the intention of the legislature to furnish state aid for each pupil transported in accordance with the requirements of Section 167.231. This conclusion is supported by the first part of Section 163.161:

"Any school district which makes provision for transporting pupils as provided in sections 167.231 and 167.241, RSMo, shall receive state aid for the ensuing year for such transportation . . ." (emphasis supplied)

Therefore, we conclude that "pupils transported" include all pupils for which transportation is provided pursuant to Section 167.231. We have already determined that the pupil in question is being transported pursuant to the requirements of Section 167.231. Consequently, this pupil should be counted as one of the "pupils transported" for the purpose of computing state aid for the school district.

Honorable Joseph H. Frappier

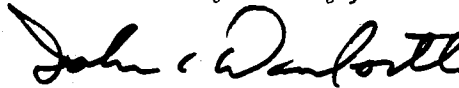
The amount of state aid for this school district would be determined by multiplying the allowance per pupil per month (determined in accordance with pages 3 and 4 of this opinion) by the average daily number of pupils transported pursuant to the requirements of Section 167.231 and multiplying the sum thus derived by the number of months the pupils are transported.

CONCLUSION

It is the opinion of this office that if a school board reasonably concludes that a student resides more than one mile from school via the shortest reasonably suitable route for pedestrian traffic and, furthermore, decides to provide public transportation for that student, the school district is entitled to state aid for the transportation of that pupil computed in accordance with Section 163.161, Senate Bills No. 1, 185 and 215, 75th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



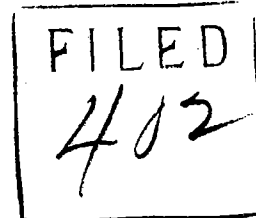
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 21
3-18-69, Wheeler

Answer by letter-Wieler
1969

OPINION LETTER NO. 402

Honorable Guss C. Salley
State Representative, District 116
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Salley:

This is in response to your request for an opinion from this office concerning the following two questions:

"(1) Can the State Liquor Laws be enforced in a 4th Class City by the Chief of Police and the Police Judge in City Court when there is no City Ordinance covering the matter?

"(2) Is it permissible for the Prosecuting Attorney to represent the Defendant in City Court in a 4th Class City in his County with reference to the above or any other violation?"

Although Secs. 85.610 and 85.620, RSMo 1959, allow the police in a fourth class city to make arrests for any offense against the laws of the city or of the state within their jurisdiction, and to keep the offender in the city prison or other proper place to prevent his escape until a trial can be had before the proper officer, the municipal court of a fourth class city has no power to hear and decide the case when there is no city ordinance covering the offense. Sections 98.500 and 98.510, RSMo 1959, limit the jurisdiction of the police judge to those offenses which involve a violation of city ordinances. Since you state in your letter that there is no city ordinances covering this particular violation of the state liquor laws, this matter cannot be tried in the municipal court.

Since state liquor laws cannot be enforced in a municipal court when there is no city ordinance dealing with the matter, it will not be necessary to discuss the second point raised in your request with respect to the county prosecuting attorney representing the

Honorable Guss C. Salley

particular defendant involved. Generally, however, we note that Sec. 56.360, RSMo 1959, prohibits the prosecuting attorney from accepting employment by any party other than the State of Missouri in any criminal case or proceeding; provided, that nothing in this section precludes him from engaging in the civil practice of law. Proceedings in municipal courts for violation of city ordinances have been held to be civil actions, not criminal. See *Kansas City v. Stricklin*, 428 S.W.2d 721, 724 (Mo. en banc 1968). This being so, the actions of a prosecuting attorney in representing a defendant in a municipal court proceeding would not involve any violation of a Missouri statute. Whether the activities of a prosecuting attorney in representing a defendant in a municipal court where the offense alleged involves facts which could also constitute a violation of state law, the prosecution of which would be the duty of the prosecuting attorney under Sec. 56.060, RSMo 1959, involve a breach of the canons of ethics as promulgated by the Missouri Supreme Court (specifically Missouri Supreme Court Rule 4.06 dealing with conflicting interests) should be referred to the Advisory Committee of the Missouri Bar Association for their opinion thereon.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PROSECUTING ATTORNEY:
CONFLICT OF INTEREST:
LEGISLATOR:

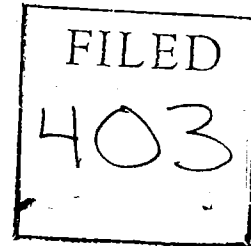
It is improper for a prosecuting attorney to represent landowners in condemnation actions filed by the State Highway Commission. It

is illegal for prosecuting attorneys to represent individuals charged for violating the criminal laws of this state. A prosecuting attorney would violate the common law prohibition against holding conflicting and inconsistent public offices if he were to serve as a member of the State Highway Commission or the State Conservation Commission. A member of the General Assembly may represent landowners in condemnation actions filed by the State Highway Commission. A member of the General Assembly may also represent individuals charged with violation of state laws in courts having jurisdiction of criminal cases including both misdemeanors and felonies in the State of Missouri. For a member of the General Assembly to serve as a member of the State Highway Commission or the State Conservation Commission would be a violation of Article 3, §12 of the Constitution of Missouri.

OPINION NO. 403

October 9, 1969

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County Court House
Savannah, Missouri 64485



Dear Mr. Lance:

This official opinion is issued in response to your request for an opinion on the following questions:

"1. Is a duly qualified and elected Prosecuting Attorney in counties of the second, third and fourth class in Missouri precluded by law from

(a) representing landowners in condemnation actions filed by the State Highway Commission for the State of Missouri for public use?

(b) representing persons charged with violations of state laws in counties other than the one in which the prosecuting attorney was elected and is serving?

(c) serving as a member of the State Highway Commission or the State Conservation Commission of the State of Missouri?

Honorable Alden S. Lance

* * * *

"2. Is a member of the General Assembly and more particularly the State Senate, who is a lawyer, precluded by law from

(a) representing landowners in actions wherein the State Highway Commission is condemning lands for public use?

(b) representing persons charged with violations of state laws in courts having jurisdiction of criminal cases, including both misdemeanors and felonies in the State of Missouri?

(c) serving as a member of the State Highway Commission or the State Conservation Commission for the State of Missouri?"

In answer to questions 1(a) and 1(b), we direct your attention to Opinions of the Missouri Bar Advisory Committee Nos. 58 and 84. Opinion 58 reads:

"Question: Is it proper for a Prosecuting Attorney in the State of Missouri to defend any criminal cases in other counties than that of which he is elected Prosecuting Attorney for, so long as the County for which he acts is not interested in the prosecution?

"Answer: No."

Opinion 84 reads:

"Question: Would it be proper and ethical for the duly elected Prosecuting Attorney of a Missouri County, to represent a land owner of another County in a condemnation suit brought to condemn the owner's land for highway purposes, such suit being brought by the State Highway Commission of Missouri?

"Answer: No."

These opinions are issued pursuant to Supreme Court Rule 5.16 which provides the Advisory Committee shall give opinions as to the interpretation of Supreme Court Rule 4 (Canons of Ethics for Missouri

Honorable Alden S. Lance

Attorneys). While violations of Supreme Court Rule 4 may not be violations of any statute of this state, we cannot conceive of any prosecuting attorney in this state violating his professional ethics. We, therefore, find it unnecessary to consider whether under the laws of this state it would be improper for a prosecuting attorney to represent a landowner in a condemnation action filed by the State Highway Commission. With respect to representing persons charged with violations of state laws in counties other than the one in which the prosecuting attorney was elected and is serving, we direct your attention to §56.360, RSMo 1959, which makes it unlawful for any prosecuting attorney to accept employment by any party other than the State of Missouri in any criminal case or proceeding.

In answer to question 1(c), we find no statutory provision which would prohibit a prosecuting attorney from serving as a member of the State Highway Commission or the State Conservation Commission. However, we believe that for a prosecuting attorney to serve on either of these commissions would be violation of the common law rule, which has been followed by the Missouri Supreme Court, against holding incompatible and inconsistent offices concurrently, State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636 (1896). Both the Conservation Commission (Constitution of Missouri, Article 4, §41) and the Highway Commission (Constitution of Missouri, Article 4, §26; §227.120, RSMo 1959) have the power of eminent domain. In State v. Hoester, 362 S.W.2d 519 (Mo. en banc 1962), the Supreme Court held a condemnation by the Highway Commission is equivalent to condemnation by the State and that the Highway Commission could condemn land belonging to lesser political subdivisions. We believe that the rationale of that decision would apply equally to the State Conservation Commission. Since a county is a political subdivision of the state and it is the prosecuting attorney's statutory duty to represent the county in actions brought against it, it is conceivable that a situation would arise where the State Highway Commission or the State Conservation Commission would seek to take land of the county by eminent domain and the prosecuting attorney would be required to represent the county. We think that if the prosecuting attorney of the county in such a situation were a member of either of these commissions, his obligations as a commissioner and his obligations as prosecuting attorney would be inconsistent and incompatible. For that reason we hold that it would be a violation of the common law of this state for a prosecuting attorney to serve as either a member of the State Conservation Commission or the State Highway Commission.

In answer to questions 2(a) and 2(b), we find no statutory provisions which would prohibit a member of the General Assembly from representing landowners in actions where either the State Highway Commission is condemning lands for public use or representing persons charged with violations of state laws in courts having jurisdiction of criminal cases.

Honorable Alden S. Lance

In answer to question 2(c), a member of the General Assembly may not serve as a member of the State Highway Commission or the State Conservation Commission because the Missouri Constitution, Article 3, §12 provides:

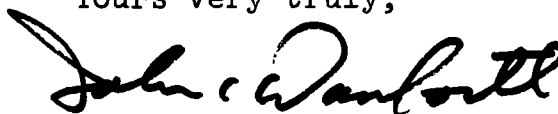
" . . . When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. . . ."

CONCLUSION

It is the opinion of this office that it is improper for a prosecuting attorney to represent landowners in condemnation actions filed by the State Highway Commission. It is illegal for prosecuting attorneys to represent individuals charged for violating the criminal laws of this state. A prosecuting attorney would violate the common law prohibition against holding conflicting and inconsistent public offices if he were to serve as a member of the State Highway Commission or the State Conservation Commission. A member of the General Assembly may represent landowners in condemnation actions filed by the State Highway Commission. A member of the General Assembly may also represent individuals charged with violation of state laws in courts having jurisdiction of criminal cases including both misdemeanors and felonies in the State of Missouri. For a member of the General Assembly to serve as a member of the State Highway Commission or the State Conservation Commission would be a violation of Article 3, §12 of the Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

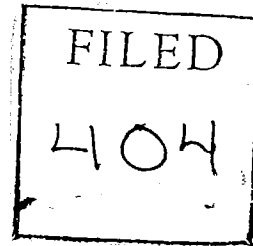
JURISDICTION:
MAGISTRATE COURTS:
NONRESIDENTS:

Magistrate courts may obtain personal jurisdiction over nonresidents in those situations enumerated in §506.500, RSMo Supp. 1967, where magistrate courts have jurisdiction over the subject-matter pursuant to other statutory provisions.

OPINION NO. 404

October 7, 1969

Honorable Donald L. Manford
State Senator, District 8
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Manford:

This official opinion is issued in response to your request for an opinion on whether §506.500, RSMo Supp. 1967, permits magistrate courts to obtain jurisdiction over nonresidents.

That section reads as follows:

"1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firms, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

"(1) The transaction of any business within this state;

"(2) The making of any contract within this state;

"(3) The commission of a tortious act within this state;

"(4) The ownership, use, or possession of any real estate situated in this state;

Honorable Donald L. Manford

"(5) The contracting to insure any person, property or risk located within this state at the time of contracting.

"2. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

Your question hinges on whether the phrase "the courts of the state" as used in the above section encompasses magistrate courts.

We are of the opinion that it does. Article V, §1 of the Constitution of Missouri, vests judicial power of the state in various courts including magistrate courts. By statute, §476.010, RSMo 1959, magistrate courts are courts of record. Section 517.010, RSMo 1959, designates the particular county or counties in which an action may be brought when a defendant or defendants are nonresidents. From these provisions and other similar statutory provisions, we see that magistrate courts are an integral part of the judicial system of Missouri. There are no statutes which restrict the jurisdiction of magistrate courts to residents. We find no authority that would dictate a reading of the phrase "courts of the state" so narrowly as to exclude magistrate courts from the operation of §506.500, RSMo Supp. 1967.

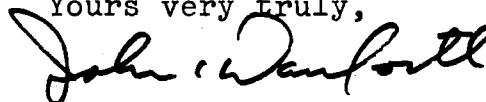
We note magistrate courts have jurisdiction over only such subject-matter as is expressly conferred by statute. Section 506.500, RSMo Supp. 1967, in no way expands on the subject-matter jurisdiction of the magistrate courts, but it does permit magistrate courts to have jurisdiction over the person in some situations where it would have been difficult to obtain jurisdiction over the person in magistrate courts prior to adoption of that section.

CONCLUSION

It is the opinion of this office that magistrate courts may obtain personal jurisdiction over nonresidents in those situations enumerated in §506.500, RSMo Supp. 1967, where magistrate courts have jurisdiction over the subject-matter pursuant to other statutory provisions.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

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486

October 9, 1969

OPINION LETTER NO. 406

Honorable John C. Ryan
Senator - 28th District
Senate Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Ryan:

Your request for our opinion on the authority and jurisdiction of the Sedalia Police Officers on the Missouri State Fairgrounds is premised upon the fact that title to the fairgrounds is vested in the State (Section 262.220, RSMo 1959) although the grounds are located in the corporate limits of the City of Sedalia.

We have researched the statutes on the state fair and its fairgrounds and find no grant or waiver of sovereignty by the State of Missouri to the City of Sedalia over the state fairgrounds.

Section 262.270, RSMo Supp. 1967, provides the Commissioner of Agriculture shall appoint and employ as many special policemen as are needed to maintain order * * * which shall clothe him with the same power to maintain order, preserve the peace and make arrests as is now held by a peace officer.

We have recently considered the authority of the Rolla police to enforce the state laws and city ordinances enacted for the maintenance of the public peace on the campus of the Missouri University at Rolla, Missouri. The campus was also located within the city limits. It is also state property. Sedalia, like Rolla, is a third class city. In our Opinion

Honorable John C. Ryan

No. 108, dated December 19, 1968, addressed to the Honorable Zane White, we held:

"It is the opinion of this department that the police of the City of Rolla, Missouri, the sheriff of Phelps County, and the state highway patrol, have authority to investigate and arrest for violation of any criminal law on the campus of the University of Missouri at Rolla in the same manner and to the same extent as they have in any criminal matter within their respective jurisdictions. That it is the duty of the watchmen, appointed by the curators of the University of Missouri with authority to make arrests as peace officers, to arrest and report any violations of the state law of which they have knowledge to the proper authorities in the same manner as is required of any peace officer."

A copy of this opinion is attached.

We reaffirm that opinion and hold that the conclusion reached in Opinion No. 108 (supra) is applicable to Sedalia and answers the questions you propound in your request.

If we can be of any further assistance to you, please feel free to submit them to us.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op.No. 108-12/19/68-White

COUNTY CLERK:
TAXATION:

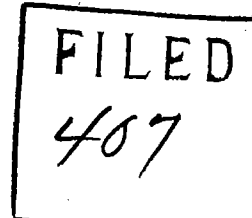
It is the ministerial duty of a county clerk to extend taxes in the tax books based upon the tax rates certified to him by the school boards of the various school districts and he has no

power to question the tax rates certified to him by such school boards or to refuse to extend the taxes because he determines that the school boards have allegedly certified to him tax rates not authorized by law.

OPINION NO. 407

September 18, 1969

Honorable Clyde Rogers
Prosecuting Attorney
Ozark County Court House
Gainesville, Missouri 65655



Dear Mr. Rogers:

This is in answer to your letter of recent date in which you request an opinion as to the power of the county clerk to refuse to extend the taxes based upon the tax rates certified to him by the Boards of Directors of school districts if the county clerk is of the opinion that the Boards have certified illegal and unlawful rates and to extend the taxes at what the clerk believes to be lawful and correct tax rates.

Your request is occasioned by the fact that the assessed valuation of real and personal property in Ozark County was increased more than 25% for the year 1969 over the assessed valuation for the year 1968 due to an order of the state tax commission.

Section 137.073 RSMo is applicable when such an increase in assessed valuation occurs. Such section provides as follows:

"Readjustment of prior levy when county assessment increased ten per cent.-- Whenever the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy

Honorable Clyde Rogers

to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds."

Under such section, the duty is placed upon the various school boards in a county in which the assessed valuation of real or personal property is increased more than 10% over the last years assessment to make such adjustment in the rates of levy as to produce substantially the same amount of taxes as previously estimated to be produced by the original levy plus such additional amounts necessary approximately to offset the district's reduction in apportionment of state school moneys.

This is a duty placed upon the school boards. There is no duty placed upon nor authority given to a county clerk to refuse to carry out the duty placed upon such clerk to extend the taxes according to the rates certified to him by the various school district boards under provisions of section 137.290 RSMo. Such section provides in part as follows:

"* * *The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for the extensions, according to the rates levied.* * *"

In the case of State ex rel. School District vs. Byers, 67 Mo. 706 the Supreme Court held that the actions of the county clerk in extending taxes are purely ministerial. The court said, l.c. 710-711.

"* * *The extension of the assessment upon the school taxbook is a ministerial, and not

Honorable Clyde Rogers

a judicial, act, and it was the duty of the clerk of the county court of Jasper county, on the receipt of the estimates made by the local directors from the proper officer, to proceed to assess the amount so returned and place it upon a separate tax-book, to be known as the school tax-book; and a mandamus could have been resorted to compel him to discharge that duty.

* * *

The statute imperatively requires him to perform it. If in a given case it be improper to make such extension and assessment, the tax-payers have a remedy to prevent it by proceeding in the circuit court.* * *"

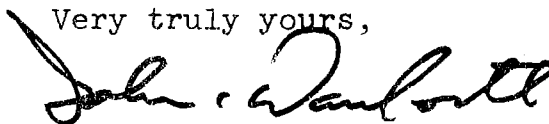
Since the duty of the county clerk in extending the taxes under section 137.290 is purely ministerial such clerk has no power or authority to determine whether the members of a school board have complied with the statutes applicable to the determination of the tax rate for such school district. The duty of the clerk is to extend in his capacity as a ministerial officer the taxes based upon the assessment of the property and the tax rate as certified to him by the bodies which have the duty, power and authority to determine tax rates. He is without authority to question the tax rates certified to him by the school boards. He does not have any power or authority to refuse to extend the taxes because he believes that the school boards have made illegal levies.

CONCLUSION

It is the opinion of this office that it is the ministerial duty of a county clerk to extend taxes in the tax books based upon the tax rates certified to him by the school boards of the various school districts and that he has no power to question the tax rates certified to him by such school boards or to refuse to extend the taxes because he believes that the school boards have certified to him tax rates not authorized by laws.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

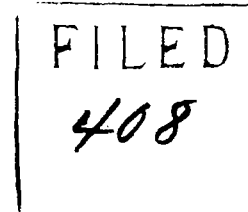
COUNTY COURTS:
SHERIFFS:
COLLECTORS:
COMPENSATION:
LEGISLATION:
AUDITOR:

(1) House Bill 116 of the 75th General Assembly which provides a mode of fixed compensation for judges of county courts of certain third class counties does not constitute an increase in the compensation of such officers and is effective October 13, 1969. The provision of said bill increasing the compensation of judges of the county courts of second class counties is not effective during the term of such judges. (2) House Bill No. 264 of the General Assembly authorizing a uniform allowance to sheriffs and deputy sheriffs does not constitute an increase in compensation during the term of such officers and is therefore effective October 13, 1969. Said bill also provides for additional compensation to sheriffs of class two counties as compensation for additional services by such sheriffs and therefore is not an increase in compensation within the meaning of Section 13, Article VII, of the Constitution and is effective October 13, 1969. (3) House Bill No. 399 of the 75th General Assembly provides that the county collector of third and fourth class counties may retain an increased percentage of fees and commissions for deputy and clerical hire. Such increase is not to the benefit of such collectors, does not constitute an increase in compensation during the term of the collector or his deputies within the prohibition of Section 13, Article VII, of the Constitution and is effective October 13, 1969. Such increase may be used in full for the fiscal year ending February 28, 1970.

OPINION NO. 408

October 9, 1969

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in answer to your questions concerning several acts passed by the 75th General Assembly, i.e.:

"1. Are the provisions of House Bills Nos. 116, 264 and 399, effective and operational on and after October 13, 1969?

"2. Assuming an affirmative answer regarding H.B. 116. What tests, if any, may be made in determining whether the drawing of annual compensation provided for in counties having assessed valuations in excess of twenty

Honorable Haskell Holman

million dollars would be violative of Article 7, Section 13, of the Constitution of Missouri if drawn by the judges presently in office?

"3. What portion of the seventy percent allowance for deputy and clerical hire provided by H.B. 399 may be used by the collectors during the fiscal year ending February 28, 1970?"

The Missouri Constitution, Section 13, Article VII, provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

With respect to the effective dates of acts the Missouri Constitution, Section 29, Article III, provides:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Further, with respect to the effective dates, Section 1.130, RSMo 1959, provides:

"A law passed by the general assembly takes effect ninety days after the adjournment of the session at which it is enacted; but if the general assembly recesses for thirty days or more, it may prescribe by joint resolution that laws previously passed and not effective take effect ninety days from the beginning of the recess, subject to the following exceptions:

(1) A law necessary for the immediate preservation of the public peace, health or

safety, which emergency is expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house the vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, takes effect as of the hour and minute of its approval by the governor; which hour and minute may be indorsed by the governor on the bill at the time of its approval;

(2) In case the general assembly, as to a law not of the character herein specified, provides that the law takes effect on a date in the future subsequent to the expiration of the period of ninety days herein mentioned the law takes effect on the date thus fixed by the general assembly;

(3) In case the general assembly provides that any law takes effect as provided in subdivision (1) of this section, the general assembly may provide in such law that the operative date of the law or parts of the law takes effect on a date subsequent to the effective date of the law."

House Bill No. 116 provides:

"Section 1. Sections 49.090, RSMo 1959 and 49.110, RSMo Supp. 1967, are repealed and two new sections enacted in lieu thereof, to be known as sections 49.090 and 49.110, to read as follows:

49.090. In counties of the second class, the judges of the county court shall receive as compensation an annual salary of seven thousand five hundred dollars.

49.110. In all counties of the third class having an assessed valuation of more than twenty million dollars and less than thirty million dollars the judges of the county court shall receive for their services three thousand dollars a year to be paid in equal monthly installments, and in all counties of the third class having an assessed value of

Honorable Haskell Holman

thirty million dollars or more the judges shall receive for their services four thousand dollars per year, paid in equal monthly installments. In all other counties of the third class the judges of the county court shall receive for their services fifteen dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive ten dollars per day for each additional day in any month that they are necessarily engaged in holding court, and all judges of the county court in all third class counties shall receive ten cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court and for all other necessary travel on official business in the personal automobile of the judge presenting the claim. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a bill, by the respective county judge, setting forth the number of miles necessarily traveled."

Section 49.090, RSMo 1959, provides:

"In all counties of the second class, the judges of the county court shall receive for their services, an annual salary of six thousand dollars. This salary is in lieu of all fees and other compensation heretofore allowed the judges."

It is obvious that Section 49.090 as amended by House Bill No. 116 provides for an increase in the annual salary of judges of the county court in counties of the second class in violation of Section 13, Article VII of the Constitution, and therefore cannot become effective during the term of such county court judges. Folk vs. City of St. Louis, 250 Mo. 116, 157 S.W. 71 (1913).

The amendments to Section 49.110 as provided in House Bill No. 116 relating to counties of the third class having an assessed valuation of more than \$20,000,000 and less than \$30,000,000 fixes the compensation of the judges of such county courts for their services at \$3,000 a year to be paid in equal monthly installments and in all counties of the third class having an assessed valuation of \$30,000,000 or more the compensation of such county judges is fixed at \$4,000 per year payable in equal monthly installments.

Honorable Haskell Holman

The remainder of the section remains unchanged and continues to provide that in all other counties of the third class the judges of the county court shall receive for their services \$15 per day for each of the first ten days in any month that they are necessarily engaged in holding court and \$10 per day for each additional day in the month that they hold court.

While the amendments fixing the compensation of such county judges according to assessed valuation provides a different mode of determination of compensation from that previously used in determining the amount to be paid, it should be noted that the maximum amount that such judges can presently receive as compensation is greater than \$4,000 per year.

In our view therefore, such compensation is not in violation of Section 13, Article VII, of the Constitution, and becomes effective October 13, 1969. State ex rel Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106 (1917).

The other provisions of Section 49.110, House Bill No. 116, relating to judges of the county court in other counties of the third class remains unchanged and do not violate said article.

With respect to House Bill No. 264, said House Bill provides:

"Section 1. In each county of this state the sheriff and each full-time deputy sheriff shall receive twenty-five dollars per month, as a uniform allowance, to be paid to him monthly out of the county treasury at the discretion of the county court. This allowance shall apply only to sheriffs and deputy sheriffs who wear an official uniform in performance of their duty.

"Section 2. 1. Sheriffs in counties of the second class shall, in addition to other duties imposed upon them by law, aid and assist the jury commissioners in such counties by conducting investigations into the identity of prospective jurors summoned for jury duty, and upon request of the board of jury commissioners, make and file a report with the board setting out the results of the investigation.

2. In addition to the salary, travel expenses, reimbursement expenses, and any other compensation now provided by law, the sheriff in each county of the second class, for the performance of the duties provided in this section, shall receive the sum of three thousand dollars

Honorable Haskell Holman

per year, payable in twelve equal monthly installments out of the county treasury."

Section 1 of House Bill No. 264 provides an allowance of \$25 per month as a uniform allowance to the sheriffs and each full-time deputy sheriff payable monthly out of the county treasury at the discretion of the county court. The allowance applies only to sheriffs and deputy sheriffs who wear an official uniform in the performance of their duty. We do not consider this as compensation and, therefore, it does not constitute a violation of Section 13, Article VII. Macon County vs. Williams, 284 Mo. 477, 224 S.W. 835 (1920).

Section 2 of House Bill No. 264 provides that the sheriffs in the counties of the second class will have additional duties imposed upon them and for such additional duties will receive the additional sum of \$3,000 per year payable out of the county treasury. This is a new section; and since it does in fact impose additional duties for the compensation, it cannot be said that the provision violates Section 13, Article VII of the Constitution. Mooney vs. County of St. Louis, 286 S.W.2d 763 (1956).

House Bill No. 399 provides:

"Section 1. Section 52.280, RSMo 1959, is repealed and one new section enacted in lieu thereof, to be known as section 52.280 to read as follows:

52.280. In addition to the maximum amount of fees and commissions permitted to be retained by county collectors in sections 52.260 and 52.270, each collector in counties of the third and fourth classes may retain for the payment of deputy and clerical hire a sum not to exceed seventy percent of the maximum amount of fees and commissions which the officer is permitted to retain by the sections, but the deputy and clerical hire is payable out of fees and commissions earned and collected by the officer only, and not from general revenue."

The repealed section, Section 52.280, provided that the collector in counties of the third and fourth classes could retain for the payment of deputy and clerical hire a sum not to exceed 25 per cent of the maximum amount of fees and commissions which they are permitted to retain by Section 52.260 and Section 52.270, RSMo 1959. In our Opinion No. 102, 1966, to the Honorable C.M. Bassman, enclosed, we held that such an increase was not an increase in the

Honorable Haskell Holman

compensation of the collector and that said collector could legally use the additional amount during his term for deputy or clerical hire. Although such deputies are officers in the sense that they have like authority as the collector, they do not have a fixed term, Section 52.300, RSMo 1959; and therefore are not themselves within the constitutional prohibitions.

The increase is effective October 13, 1969, and may be used in full for such hire for the fiscal year ending February 28, 1970.

CONCLUSION

It is the opinion of this office that:

1. House Bill 116 of the 75th General Assembly which provides a mode of fixed compensation for judges of county courts of certain third class counties does not constitute an increase in the compensation of such officers and is effective October 13, 1969. The provision of said bill increasing the compensation of judges of the county courts of second class counties is not effective during the term of such judges.

2. House Bill No. 264 of the General Assembly authorizing a uniform allowance to sheriffs and deputy sheriffs does not constitute an increase in compensation during the term of such officers and is therefore effective October 13, 1969. Said bill also provides for additional compensation to sheriffs of class two counties as compensation for additional services by such sheriffs and therefore is not an increase in compensation within the meaning of Section 13, Article VII, of the Constitution and is effective October 13, 1969.

3. House Bill No. 399 of the 75th General Assembly provides that the county collector of third and fourth class counties may retain an increased percentage of fees and commissions for deputy and clerical hire. Such increase is not to the benefit of such collectors, does not constitute an increase in compensation during the term of the collector or his deputies within the prohibition of Section 13, Article VII, of the Constitution and is effective October 13, 1969. Such increase may be used in full for the fiscal year ending February 28, 1970.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

COUNTIES: With respect to the provisions of
COUNTY OFFICERS: Conference Committee Substitute for
OFFICERS: House Substitute for Senate Bill No.
COUNTY CLERKS: 13 of the 75th General Assembly, (1)
COUNTY COURTS: Section 50.810 of said bill relating
COMPENSATION: to preparation of county financial
FEES: statements is effective January 1,
COUNTY FINANCIAL STATEMENT: 1971, and effective also on that date
AUDITOR: are the amendments to Section 51.300
which provides that the compensation

of county clerks of county courts of the second, third and fourth classes be computed upon the variables of population and assessed valuation and that said compensation constitutes the entire compensation for services performed by said clerk except for fees for the issuance of fish and game licenses or permits. After the effective date of said section, the county clerks will not be entitled to receive any additional amount for the service performed under Section 50.810 as amended by the bill. The county court may contract with individuals, corporations or associations for the performance of said services in an amount that the court deems reasonable and just; (2) Section 1 of said bill provides that in counties of second, third and fourth classes which have adopted the provisions of Chapters 114 and 116, RSMo, providing for voter registration, the county clerk shall perform the services specified therein and for such services shall, in addition to the compensation now provided by law, receive the sum of \$1,500 per year. Section 1 is effective October 13, 1969. However, such services are to be performed annually and before May 10th. Accordingly, these services could not be performed for the year 1969, and such county clerks are not entitled to such compensation for the year 1969. Such services can be performed for the year 1970 and such compensation is effective for the year 1970, but not thereafter in view of the effective date of termination of the provisions for increased compensation which is December 31, 1970.

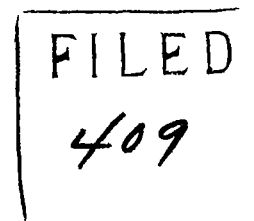
OPINION NO. 409

October 9, 1969

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Holman:

This opinion is in response to your questions with respect to the Conference Committee Substitute for House Substitute for



Honorable Haskell Holman

Senate Bill No. 13 of the 75th General Assembly relating to county clerks in second, third and fourth class counties concerning the following specific questions:

"1. What compensation, if any, may the county court pay the county clerk or any other person employed to prepare the county financial statement as required by the Act? If the county clerk is so designated and employed to prepare the statement, would the compensation paid therefor, if any, be returnable to the county as an accountable fee?

"2. May the compensation provided for the designated county clerks for the additional duties enumerated in Section 1 of the Act be paid to such clerks for the year 1969, inasmuch as the duties required to be performed could not be discharged within the prescribed time limit set forth in the Act?

"In the event the county clerks are entitled to such compensation for the year 1969, will they be entitled to the full \$1,500.00 on the pro rata portion thereof as the period October 13 to December 31 bears to the whole year?"

That portion of the Bill which is relative to your first question is amendatory to Section 50.810, RSMo 1959, and states as follows:

"1. The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this section.

"2. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at

least two copies of said statement that the same may be pasted on the record.

"3. The state auditor shall notify the county treasurer immediately of the receipt of the proof of publication of the statement in this section required. After the first of April of each year after the effective date of this law the county treasurer shall not pay or enter for protest any warrant for the pay of any judge of any county court until notice is received from the state auditor that the proof of publication herein provided for has been filed. Any county treasurer paying or entering for protest any warrant for any judge of the county court prior to the receipt of such notice from the state auditor shall be liable on his official bond therefor.

"4. Within twelve months after the effective date of this law the state auditor shall prepare sample forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the performance of any duty imposed by this law. If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare the financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this law he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty."

Present Section 50.810 states:

"1. The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay the

publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this section.

"2. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law, and no pay shall be allowed for pasting a printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor; provided, any part not properly chargeable to any specific fund shall be paid from the fund from which officers salaries are paid.

"3. The state auditor shall notify the county treasurer immediately of the receipt of the proof of publication of the statement in this section required. After the first of April of each year after the effective date of this law the county treasurer shall not pay or enter for protest any warrant for the pay of any judge of any county court until notice is received from the state auditor that the proof of publication herein provided for has been filed. Any county treasurer paying or entering for protest any warrant for any judge of the county court prior to the receipt of such notice from the state auditor shall be liable on his official bond therefor.

"4. Within twelve months after the effective date of this law the state auditor shall prepare sample forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the performance of any duty imposed by this law. If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this law he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty."

It therefore appears that in amending this section the legislature did not reenact that portion of Paragraph 2 which specifically set out the compensation for preparing the financial statement and required that the "funds" bear a pro-rata charge.

We further note this Bill also amends Section 51.300, RSMo Supp. 1967, to provide for an annual salary for clerks of the county court for each county of the second, third and fourth class, which salary shall be equal to the sum of two variable amounts, one based upon the population of the county and the other upon the valuation of the county. The amendment, Paragraph 4 of Section 51.300 as contained in the said Bill also states that:

"The salary provided in this section shall be the total compensation received by the county clerk, except that he may retain any fees to which he is entitled for services performed in the issuance of fish and game licenses or permits. Any other fees received by him shall be deposited in the county treasury or as provided by law. His total annual salary, excluding the only allowable fees of fish and game licenses or permits above, shall be determined on or before January 1, 1971, and each year thereafter. The county population shall be based on the last federal decennial census, and the assessed valuation of the county shall be based upon the

Honorable Haskell Holman

last available report of the state tax commission."

This Bill also provides that the repeal of Sections 50.810, 51.360 and 51.400, RSMo 1959, and of Sections 51.300 and 51.350, RSMo Supp. 1967, and that the effective date of the sections enacted in lieu thereof to be known as Sections 50.810 and 51.300 shall be January 1, 1971.

Clearly, the Bill contemplates that the clerks of the county court of the second, third and fourth classes shall receive certain and definite compensation except with respect to fees for the issuance of fish and game licenses or permits and that all other fees will be paid into the county treasury or as provided by law.

In partial answer to your first question therefore, the county court has no authority to make any additional payment to the county clerks for the preparation of the statement as provided in the bill amending Section 50.810.

Clearly, a public officer cannot claim compensation for official duties unless he can point out a statute authorizing such payment. Nodaway County vs. Kidder, 344 Mo. 795, 129 S.W.2d 857.

In further answer to your first question, we note that the county court under the bill is authorized to employ some person to prepare the statement. The word "person" also applies to "bodies politic and corporate, and to partnerships and other unincorporated associations." Section 1.020 (7), RSMo 1959.

We assume that the legislature did not unintentionally omit provisions for the precise amount of payment for the preparation for the financial return and therefore that they intended that the county court may contract for such services with persons other than county officers or employees as in the case of any other contract for personal services for any amount of compensation which the county court deems just and reasonable. Further, there is no longer any authority to pro rate the charges.

With respect to your second question, the additional duties that you speak of are set out in what is designated as Section 1 on page 5 of the bill.

Section B on page 6 of the bill specifically states that the effective date of Section 1 shall be October 13, 1969.

Section 1 itself provides:

"1. In counties of the second, third, and fourth classes, which have adopted the provisions of chapters 114 and 116, RSMo, the

Honorable Haskell Holman

county clerk shall annually, on or before May tenth, inspect all voting precincts in the county, review the described boundary lines, and survey the number of voters in each precinct measured by the vote at the last preceding presidential election, and within thirty days after the conclusion of such inspection, present a signed report to the county court and the county chairman of the two political parties receiving the largest number of votes in the last presidential election, detailing changes, alterations, and additions which appear to be necessary for the convenience of the voters.

"2. For the additional duties imposed by section 1 of this act, the county clerk shall receive in addition to the compensation now provided by law the sum of one thousand five hundred dollars per year.

"3. The county clerk shall be reimbursed for his reasonable and necessary travel expenses expended in the performance within the county of the duties imposed by this section in an amount to be determined by the county court, not to exceed ten cents per mile traveled."

Section 2, page 5 of the bill provides:

"Notwithstanding other provisions of this act to the contrary the salary of county clerks of counties of the fourth class including all fees shall not be in excess of five thousand five hundred dollars."

It should be emphasized that the first part of Paragraph 1 of Section 1 states that the county clerk "shall annually, on or before May 10th," perform such services. "Annually" means "1. Reckoned by the term of a year . . . 2. Occurring once each year." Webster's New International Dictionary, Second Edition (1950), p. 108.

Inasmuch as the duties contemplated by Section 1 must be performed before May 10th but also must be performed annually, it is our view that Section 1 of the bill does not contemplate that any such duties will be performed during the year 1969; and as a consequence, no compensation can be paid during 1969 as the payment

Honorable Haskell Holman

of such compensation during 1969 would constitute an increase of the compensation of the officer during his term without an additional increase in duties. We note also that Section C of page 6 of the bill provides that the provisions of Subsections 2 and 3 of Section 1 shall terminate December 31, 1970. The county clerk in counties of the second, third or fourth classes who perform the services set out under Section 1 of the bill will receive the additional compensation for such work in 1970, but not in 1969, and not in 1971 or thereafter.

The payment of additional compensation for additional services is not in violation of Section 13, Article VII of the Constitution of Missouri which prohibits an increase in compensation of officers. Mooney vs. County of St. Louis, 286 S.W.2d 763 (1956).

CONCLUSION

It is, therefore, the opinion of this office with respect to the provisions of Conference Committee Substitute for House Substitute for Senate Bill No. 13 of the 75th General Assembly that:

(1) Section 50.810 of said bill relating to preparation of county financial statements is effective January 1, 1971, and effective also on that date are the amendments to Section 51.300 which provides that the compensation of county clerks of county courts of the second, third and fourth classes be computed upon the variables of population and assessed valuation and that said compensation constitutes the entire compensation for services performed by said clerk except for fees for the issuance of fish and game licenses or permits. After the effective date of said section, the county clerks will not be entitled to receive any additional amount for the service performed under Section 50.810 as amended by the bill. The county court may contract with individuals, corporations or associations for the performance of said services in an amount that the court deems reasonable and just;

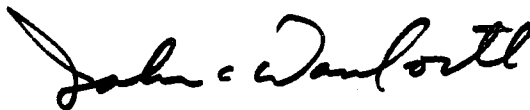
(2) Section 1 of said bill provides that in counties of second, third and fourth classes which have adopted the provisions of Chapters 114 and 116, RSMo, providing for voter registration, the county clerk shall perform the services specified therein and for such services shall, in addition to the compensation now provided by law, receive the sum of \$1,500 per year. Section 1 is effective October 13, 1969. However, such services are to be performed annually and before May 10th. Accordingly, these services could not be performed for the year 1969, and such county clerks are not entitled to such compensation for the year 1969. Such services can be performed for the year 1970 and such compensation is effective for the year 1970, but not thereafter in view of the effective date

Honorable Haskell Holman

of termination of the provisions for increased compensation which is December 31, 1970.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

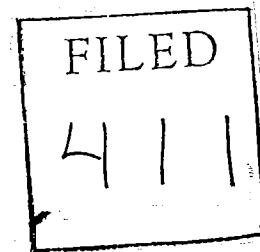
JOHN C. DANFORTH
Attorney General

BONDS:

Bondsman may establish qualification by means of encumbered property having clear value in excess of encumbrance, or by personal property having stable value, but not by property held by entireties.

September 30, 1969

OPINION NO. 411



Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
Hillsboro, Missouri 63050

Dear Mr. Weier:

This official opinion is submitted in response to your request through your assistant, William T. Brooking, Jr., presenting certain questions regarding the property holdings of bondsmen as specified in Supreme Court Rule 32.15. Such rule provides as follows:

"In addition to the qualifications specified in Rule 32.14, an individual shall not be taken as a surety on any bail bond unless he shall be the owner of real estate or personal property having a reasonable market value, in excess of all encumbrances thereon, exemptions and all other liabilities, at least equal to the amount specified in the bond which he proposes to execute. In order to qualify upon the basis of real estate owned, an individual shall be the sole, legal and equitable owner thereof in fee simple and of record. If there are several sureties, the aggregate market value of real estate or personal property owned by them in excess

Honorable G. William Weier

of encumbrances, exemptions and all other liabilities, shall be at least equal to the amount specified in the bond."

We will discuss the several questions in sequence.

1. May a bondsman qualify on the basis of property standing in the names of himself and his wife?

Under the law of Missouri property standing in the names of two persons who are in fact husband and wife is held in estate by entirety unless there is an unequivocal indication to the contrary. The wife's interest in property so held is not subject to the tort or contract liabilities of the husband and the husband has no power to create a lien or charge against this property without her consent. Among the many cases so holding are *Dickinson v. Gault*, 229 S.W.2d 283 (St.L.Ct.App. 1950) and *Wilson v. Fower et al.*, 155 S.W.2d 502 (K.C.Ct.App. 1941).

The husband, then, is not the "sole owner" of entirety property and may not use such property as a basis for qualification under Rule 32.15. It is apparent that the entirety property would not be available to satisfy the husband's obligation as a bondsman, unless the wife had so agreed.

2. May a bondsman establish his eligibility by means of property which is subject to deed of trust, mortgage or other encumbrance?

The first sentence of Rule 32.15 requires property "having a . . . value, in excess of all encumbrances . . . at least equal to the amount specified in the bond . . ." By mentioning a value in excess of encumbrances, the rule clearly connotes the possibility that there will be encumbrances, and does not say that encumbered property is disqualified. The first sentence of the rule does not distinguish between real and personal property, for both are specified in the sentence.

We feel that these clear indications in the first sentence should prevail over the less specific language of the second sentence, requiring that the bondsman be "the sole legal and equitable owner" of the property considered in determining his qualifications. In technical speech the trustee of a deed of trust has legal ownership of the property involved and the cestui que trust has an equitable ownership, and any holder of an encumbrance

Honorable G. William Weier

would have a species of equitable ownership, but to read the second sentence of Rule 32.15 as precluding any encumbrance would make portions of the first sentence meaningless, and language is construed to avoid this result whenever possible. We feel that it is more reasonable to read the second sentence of the rule as requiring clear ownership, over and above the maximum demonstrable value of encumbrances. The requirement that ownership be "in fee simple" precludes qualification on the basis of some lesser estate such as a life estate or vested or contingent remainder. The requirement that the ownership be "of record" would rule out property held in the name of a "straw party." The provisions would also exclude property which is the subject of a contract for sale and in which the purchaser would therefore have an equitable ownership. These situations give ample meaning to the second sentence, and would support a construction which would not preclude all encumbrances.

Encumbered property would qualify only if the encumbrance had an ascertainable value, so that the value of the property over and above the encumbrance may be clearly demonstrated. If the encumbrance is such that it might consume the entire property under certain contingencies, then the requirement of the rule would not be met and the property would not be eligible.

3. Would cars, household goods and similar property qualify as security?

The rule permits qualification on the basis of personal property as well as real property and Rule 32.16 permits the scheduling of personal property. Nothing would exclude tangible personal property such as you describe.

Even so, we feel that the responsible authority would not be obliged to accept such items as automobiles and household goods in qualification. Automobiles are subject to rapid depreciation, and therefore are not satisfactory security for bonds which may run for several years. Household goods are difficult to value, and the ownership situation is often confused as between husband and wife. Since the purpose of the qualification requirements is to ensure the financial responsibility of the bondsman, the authorities who are responsible should not have to accept property which is of unstable value or in which the value is difficult to demonstrate or realize.

4. Is a note secured by deed of trust acceptable security for a bondsman?

A note, secured or otherwise, is intangible personal property. Nothing in the rules says that property of this type is not available to demonstrate a bondsman's qualification. The ascertainable value of the note, therefore, may be so used.

Honorable G. William Weier

CONCLUSION

It is the opinion of this office:

1. That a bondsman may not establish his qualification under Supreme Court Rule 32.15 by property standing in the names of himself and his wife.

2. That property encumbered by deed of trust, mortgage, or otherwise may be so used to the extent of its demonstrable value in excess of all encumbrances.

3. That tangible property such as automobiles and household goods is not categorically excluded, but that the official responsible for approving a bondsman's qualifications could exclude such property if of the opinion that it does not have a stable or demonstrable value.

4. That a bondsman may establish his qualifications by the demonstrable value of a promissory note, secured or unsecured, and owned by him.

The foregoing opinion, which I approve, was prepared by my special assistant, Charles B. Blackmar.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TEACHERS:

1. Insubordination as used in paragraph 168.107 1(3) means:

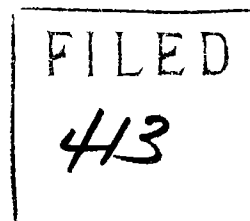
A teacher's willful, intentional refusal or neglect to obey an express or implied command, instruction, order or rule of the teacher's employing school board, which command, instruction, order or rule is known to the teacher, is reasonable in nature and is given by and with proper authority.

2. A teacher belonging to a voluntary organization whose membership consists in part of teachers would not be in violation of Section 168.116 if the association takes part in the management of a campaign for the election or defeat of a member of a board of education so long as the teacher member does not take part in the initiation or control of the campaign.

OPINION NO. 413

November 25, 1969

Honorable William B. Waters
State Senator, District 17
First Office Building
Liberty, Missouri 64068



Dear Senator Waters:

This letter is in response to your request for an official opinion on the following questions pertaining to House Bill 120 passed by the 75th General Assembly:

"1. Section 168.107, 1. (3). Many school districts are faced with the problem of establishing guidelines on dismissal policies. They would like to have a definition of 'insubordination' as it appears in said section.

"2. Section 168.116 prohibits a teacher from taking part in the management of the campaign for the election or defeat of a member of the school board. There are a number of voluntary groups or associations of those who are interested in education whose membership consists in part of teachers. Should such an association take part in the management of a campaign, would those teachers who belong to the association be in violation of this section?"

I.

A Definition of "Insubordination" as
it Appears in Section 168.107 1(3).

Honorable William B. Waters

Section 168.107 1 reads in part as follows:

"An indefinite contract with a permanent teacher shall not be terminated by the board of education of a school district except for one or more of the following causes:

* * * *

"(3) Incompetency, inefficiency or insubordination in line of duty;" (emphasis added)

"Insubordination" is not defined in House Bill 120. Set forth below are general definitions of "insubordination" based on cases from many jurisdictions not necessarily in the education field.

". . . Thus, generally a refusal or neglect on the servant's part to obey a lawful and reasonable command, order, or rule of the master which, in view of all the circumstances of the case, amounts to insubordination, and is inconsistent with his duties to his master, is a sufficient ground for discharge. . . ." 56 C.J.S. Master and Servant, Section 42h. p. 432.

"Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer, and wilful or intentional disobedience thereof, as a general rule, justifies a recission of the contract of service and the peremptory dismissal of the employee, whether the disobedience consists in a disregard of the express provisions of the contract, general rules or instructions, or particular commands. . . ." 35 Am Jur. Master and Servant, Section 44 p. 478.

"Rules, instructions, or commands in order to be the ground for discharge on the score of disobedience, must be reasonable and lawful, must be known to the employee, and must pertain to the duties which the employee has engaged to discharge. . . ." Id. at Section 45 p. 479.

The courts in other states have followed these general rules in cases involving teachers and school personnel. For instance

Honorable William B. Waters

the Supreme Court of Wisconsin in Millar v. Joint School District No. 2, Village of Wild Rose, 2 Wis.2d 303, 86 N.W.2d 455 (1957) a teacher brought action against the school district and others for damages because he was discharged for insubordination. The court in defining "insubordination" relied in part upon the general definitions set forth above. In addition the court noted the following from a previous Wisconsin case:

"In Green v. Somers, 1916, 163 Wis. 99, 100, 157 N.W. 529, 530, it was said:

"'An employer has the right to give all lawful and reasonable commands deemed by him necessary to the proper management of his business, and the employe's duty is to obey such commands where there is nothing in the contract of employment to relieve him from such duty.

"'Any inexcusable and substantial insubordination on the part of an employe or willful refusal to obey such commands amounting to insubordination, is good ground for discharge. Thomas v. Beaver Dam Mfg. Co., 157 Wis. 427, 147 N.W. 364; 26 Cyc. 992. . . ." Id. at 460-461.

In Kostanzer v. State ex rel. Ramsey, 205 Ind. 536, 187 N.E. 337 (1933) the Supreme Court of Indiana had before it the question whether a teacher's marriage in defiance of a rule prohibiting marriage was insubordination under the Indiana Teacher Tenure Act. "Insubordination" was defined in the Indiana Teacher Tenure Act as the ". . . wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation." Id. at 341. The court stated that if the rule respecting marriage was a reasonable rule then the teacher's marriage was an act of insubordination and constituted good and just cause for the cancellation of her contract. However, the court concluded that it was not a reasonable rule and therefore there was no insubordination.

The Alabama Supreme Court in State ex rel. Steele v. Board of Education of Fairfield, 252 Ala. 254, 40 So.2d 689 (1949), had before it the question whether a teacher had been insubordinate under the Alabama Teacher Tenure Act for refusing to take a mental ability test which was required by the rules and regulations of her school board. The court defined "insubordination" as follows:

"One of the statutory grounds for the cancellation of a contract of a tenure teacher is 'insubordination.' § 356, Title 52 Code 1940.

Honorable William B. Waters

The term 'insubordination' is not defined in the statute, but unquestionably it includes the willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education." Id. at 695.

In State ex rel. Richardson v. Board of Regents of the University of Nevada, 70 Nev. 347, 269 P.2d 265 (1954) the Supreme Court of Nevada reviewed an order of the Board of Regents discharging a professor. In concluding that the circumstances did not support a charge of insubordination, the court relied upon the following definition:

". . . From the many definitions found in the cases we may say without greater elaboration that 'insubordination' imports a willful disregard of express or implied directions, or such a defiant attitude as to be equivalent thereto. 'Rebellious', 'mutinous', and 'disobedient' are often quoted as definitions or synonyms of 'insubordinate'. Refinements that deal with the authority of the superior officer to promulgate the order or with the reasonableness of the order in question need not be considered." Id. at 276.

The Superior Court of Delaware in Shockley v. Board of Education, Laurel Special School District, 51 Del. 537, 149 A.2d 331 (1959) relied on the definitions of insubordination in both the Steele and Richardson cases in arriving at its own definition of the Delaware statutory language of "willful and persistent insubordination":

"As stated above, our Delaware statute does not define the words 'willful and persistent insubordination', but after an examination of the cases, I am persuaded that a fair and reasonable definition is as follows:

"'A constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.'" Id. at 334.

In analyzing the sufficiency of a notice of termination to a probationary teacher under the Arizona Teacher Tenure Act, the Supreme Court of Arizona in School District No. 8, Pinal County v. The Superior Court of Pinal County, 102 Ariz. 478, 433 P.2d 28 (1967) stated as follows:

Honorable William B. Waters

"Clearly, the reasons assigned for the termination of the Forseth contract, that is, insubordination and lack of cooperation, are generic, categorizing the type of conduct which the school board or superintendent found objectionable. But both grounds, we think, have fixed and well-understood meanings so that they do not leave the teacher in ignorance. Insubordination imports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders, McIntosh v. Abbot, 231 Mass. 180, 120 N.E. 383, and lack of cooperation is characteristically a subtle species of insubordination. Both terms are descriptive of a class of censurable practices destructive of the efficiency of the employer's organization. Accordingly, where, as here, a probationary teacher's right to remain in public service is dependent upon whether the appointing officers are satisfied with the teacher's conduct and capacity, and they are, in law, the sole judges, we are reluctant to place an unduly narrow construction on the legislative language lest it defeat the salutary purpose of determining the fitness of a probationer to serve a school district." Id. at 30. (emphasis supplied)

A careful search of Missouri cases has not revealed any definition of "insubordination" in a case involving school teachers or school personnel. However, the question of what is "insubordination" in other areas has come before Missouri courts. For instance, in Jordan v. Weber Moulding Company, 77 Mo.App. 572 (1898) the plaintiff was a traveling salesman who claimed he was wrongfully discharged. The question in the case was whether plaintiff's failure to follow certain instructions constituted insubordination and therefore just cause for his discharge. The St. Louis Court of Appeals approved the giving of the following instruction to the jury:

"If from the evidence you believe that the plaintiff intentionally disobeyed the instructions given by the defendant to the plaintiff regarding his expenses or his route, or concerning other matters connected with the business, or neglected or refused to perform duties imposed upon him, and that such disobedience or such neglect was in regard to matters of such importance in the conduct of the business as reasonably required obedience and fulfillment on the part of the plaintiff, and that the

Honorable William B. Waters

defendant with reasonable promptness discharged the plaintiff for such disobedience or neglect, then his discharge was "with just cause."
...'" Id. at 575.

In another case involving claimed wrongful discharge, Craig v. Thompson, 244 S.W.2d 37 (Mo. 1951) the Supreme Court of Missouri stated:

"... In every contract of employment it is implied that the employee will obey the lawful and reasonable rules, orders and instructions of the employer, and disobedience of such known rules justify the employee's discharge." Id. at 41.

In Lee v. Missouri Pacific Railroad Company, 335 S.W.2d 92 (Mo. 1960) decided by the Supreme Court of Missouri an engineer brought suit against his employer for wrongful discharge. The question before the court was whether plaintiff's refusal to follow a particular instruction was insubordination. In concluding that it was, the court stated as follows:

"... Since there had apparently been some confusion about the proper interpretation of Rule 104, at least on plaintiff's line, plaintiff's superior officers had not only the authority but the duty to interpret it. Plaintiff had been informed of their interpretation, which cannot be held unreasonable, before the occurrence herein involved; but even though he knew of it and knew that the conductor had been so instructed concerning it, he deliberately ordered action exactly contrary to the instructions he knew had been given by the conductor on that occasion. Plaintiff had no right to make himself the sole judge of the proper interpretation of Rule 104. We must hold that plaintiff's action was in violation of Rule 104 as interpreted by his superior officers; that he violated Rule 107 in refusing to obey the conductor's instructions and violated Rule 501 by refusal to comply with the instructions of the trainmaster concerning the authorized interpretation of Rule 104; that his conduct was insubordination stated as ground for discharge in Rule N;" Id. at 98.

Based on the foregoing cases, we conclude that a reasonable definition of "insubordination" as used in Section 168.107 1(3) would be as follows:

Honorable William B. Waters

A teacher's willful, intentional refusal or neglect to obey an express or implied command, instruction, order or rule of the teacher's employing school board, which command, instruction, order or rule is known to the teacher, is reasonable in nature and is given by and with proper authority.

II.

Would a Teacher Belonging to an Organization Whose Membership Consists in Part of Teachers be in Violation of Section 168.116 if this Organization Took Place in the Management of a Campaign for the Election or Defeat of a Member of a School Board?

We believe that the basis for answering this question is contained in Opinion No. 353 of this office, dated August 26, 1969. A copy of this opinion is enclosed. As stated therein, "The public purpose for which this statute was written was apparently to prevent the disruption of schools and school boards by political campaigns. . . ." Id. at 2. Furthermore, a teacher should have ". . . no share of the control or guidance of a campaign for or against one of his own school board members. . . ." ". . . It is only necessary that he avoid exacerbation of relations between board members and teachers by initiating or taking part in the running of a campaign against or for a board member." Id. at 3. Therefore, we believe that a teacher member of a group or association interested in education whose membership consists in part of teachers would not be in violation of this section so long as the teacher in question does not take part in the initiation or control of a campaign against or for a board member.

CONCLUSION

Therefore, it is the opinion of this office that:

1. Insubordination as used in paragraph 168.107 1(3) means:

A teacher's willful, intentional refusal or neglect to obey an express or implied command, instruction, order or rule of the teacher's employing school board, which command, instruction, order or rule is known to the teacher, is reasonable in nature and is given by and with proper authority.

2. A teacher belonging to a voluntary organization whose membership consists in part of teachers would not be in violation of

Honorable William B. Waters

Section 168.116 if the association takes part in the management of a campaign for the election or defeat of a member of a board of education so long as the teacher member does not take part in the initiation or control of the campaign.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

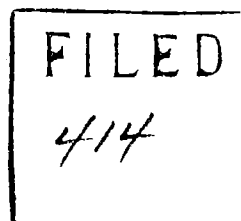
Enclosure: Op. No. 353
8-26-69, Gralike

Answer by letter--Boicourt

October 2, 1969

OPINION LETTER NO. 414

Honorable Thomas E. Miles, President
Missouri State Board of Accountancy
312 East Capitol Avenue
Post Office Box 613
Jefferson City, Missouri 65101



Dear Mr. Miles:

This official opinion is issued in response to your request for a ruling submitted to this office and asking the following question:

Is the Missouri State Board of Accountancy empowered to issue a Missouri certified public accountant certificate, without examination, to an applicant who has passed the American Institute of Certified Public Accountants' uniform written examination in Wisconsin, and who prior to that time was an Internal Revenue agent more than 5 years, of which at least three years were field experience?

The resolution of the problem posed by your inquiry depends on an interpretation and application of § 326.090, RSMo Supp. 1967, which deals with the circumstances under which a certificate as a certified public accountant may be issued to one holding such a certificate issued by another state, without an examination. The relevant portion of that section is as follows:

Honorable Thomas E. Miles

1. The board may in its discretion waive the examination of, and may issue, upon the payment of a fifty dollar registration fee, a certificate as a certified public accountant to any person possessing the qualifications mentioned in section 326.060 who is the holder of a valid and unrevoked certificate as a certified public accountant issued under the laws of any state or territory of the United States, provided the requirements for the certificates in the state or territory which has granted it to the applicant were, in the opinion of the board, at least equivalent to those required in this state at the time the applicant's original certificate was issued.

The last proviso is especially important in this instance. As applied to the facts you pose, this proviso authorizes the Missouri State Board of Accountancy to make an opinion determination as to whether the certificate requirements of Wisconsin were "at least equivalent" to those of Missouri on August 4, 1966, the date the Wisconsin certificate was issued.

On that date, the Wisconsin requirements, as evidenced by § 135.04, of the 1965 edition of the Wisconsin Statutes, were: That the applicant be a citizen of the United States or have, in good faith, declared his intention so to become; that he be over twenty-three years of age and of good moral character; that he have successfully passed the requisite examination or have a foreign certificate acceptable to Wisconsin standards; that he have four years of high school education or the equivalent; and that he have at least three years' accounting experience to that of a senior in public practice, the efficiency of the experience to be judged by the appropriate authority, except that evidence of sufficient technical education could be accepted by the Board in lieu of one and one-half years' of such experience.

The statutes of Missouri in regard to accountants were amended in 1967. As we read § 326.090 (1), RSMo, Supp. 1967, the Missouri law in effect on August 4, 1966, is that by which the equivalence of the contemporary Wisconsin law is to be measured. The only real differences in the Missouri and Wisconsin law on that date was (1) the former required only that the applicant be twenty-one years of age, and (2) the former allowed technical education to stand in lieu only of one year's experience and that conditioned on college graduation in a course of study centered on accounting and related

Honorable Thomas E. Miles

subjects. Sections 326.060 (2) and 326.070 (3), RSMo 1959.

The Wisconsin law in force in 1966, therefore, would seem to be "at least equivalent" to the Missouri law of that date except for the amount of credit awarded higher education as a substitute for actual on-the-job experience. Whether or not this discrepancy affected the situation set forth in your letter is unascertainable from the information available to us. And from the language of the statute "that the requirements for the certificates . . . were . . . at least equivalent," whether the applicant in question was affected by said discrepancy is irrelevant. You will please note that the portion of the Missouri law now in force relating to employment with the Internal Revenue Service was added in 1967, and, hence, is not relevant to the question presented.

It is the opinion of this office that the Missouri State Board of Accountancy cannot issue a certified public accountant certificate, without examination, to an individual who has a Wisconsin certificate, unless, in the opinion of the Board, the requirements for such certificates were "essentially equivalent" in Wisconsin on the date the Wisconsin certificate was issued to the requirements of Missouri on that date; and, in this case, the Board could find that the requirements are not "essentially equivalent" due to greater credit given technical education in Wisconsin in lieu of practical experience on the date in question.

Yours very truly,

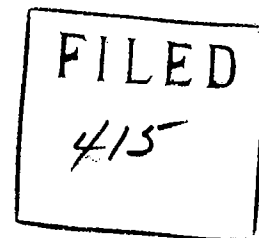
JOHN C. DANFORTH
Attorney General

Answer by letter-Bartlett

September 23, 1969

OPINION LETTER NO. 415

Honorable Jack J. Schramm
State Representative, District 37
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Schramm:

This letter is in response to your request for an opinion as to whether the Constitution and Bylaws of the Governor's Advisory Council on Vocational Education, enclosed with your letter of July 21, 1969, are consistent with Missouri law, and, more particularly, the federal statute known as Public Law 90-576, Amendments to the Vocational Education Act of 1963, 20 U.S.C., Sections 1241-1248, 1261-1264, 1281-1284, 1301-1305, 1321-1323, 1341, 1351-1355, 1371-1374, 1391.

In addition to reviewing the Amendments to the Vocational Education Act of 1963, we have examined proposed regulations of the United States Office of Education. A copy of the proposed regulations which pertain to the State Advisory Council (Sec. 102.21-102.26) is enclosed herewith.

We were unable to locate any Missouri statutory provisions pertaining directly to the Advisory Council on Vocational Education. Furthermore, there is no Missouri statute dictating the form or content of the Constitution and Bylaws of the Missouri State Advisory Council on Vocational Education.

As a result of our review of the Amendments to the Vocational Education Act of 1963 and of the proposed regulations, we make the following suggestions:

1. Add an additional subparagraph in Article 2, Sec. 3, providing that the Advisory Council shall prepare and submit a statement describing its consultation with the State Board on its State plan.

Honorable Jack J. Schramm

(See Reg. Sec. 102.23(a)) (According to Reg. 102.31 (e) (2) this statement must accompany the State plan for each fiscal year and any amendment thereto.)

2. Add after "as amended" in Article 2, Sec. 3, subparagraphs (a) and (b), "and any regulations propounded pursuant thereto."

3. Add a new subparagraph in Article 2, Sec. 3, providing that the Advisory Council shall prepare and submit through the State Board, within 60 days after the United States Commissioner has accepted certification of the establishment and membership of the Advisory Council, an annual budget covering the proposed expenditures of the Advisory Council and its staff for the following fiscal year. (See Reg. 102.23(e))

In addition to the foregoing, we make the following comments:

1. There is a typographical error in Sec. 3(g), Article 2. After the word "board" in the first line of that subparagraph it appears as if the word should be "to" rather than "of."

2. In Article 3, Sec. 6, it is provided that "the chairman shall see that all funds of the M.S.C.A.V.E. subject to withdrawal, are approved in the name of the M.S.A.C.V.E. by the treasurer and chairman," If this means that the treasurer and chairman must approve the withdrawal of all funds, there would appear to be a conflict with Article 3, Sec. 10, in which it is provided that a warrant or order must be signed by the chairman and recording secretary before disbursement can be made of M.S.A.C.V.E. funds.

With the exception of the matters mentioned above, we believe that the Constitution and Bylaws of the Missouri State Advisory Council on Vocational Education comply with the requirements of the applicable federal law and regulations.

Yours very truly,

JOHN C. DANFORTH
Attorney General

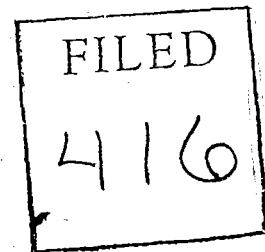
SCHOOLS:

There is no Missouri statute or regulation of the State Board of Education requiring students to take "mass showers" or requiring teachers to include sex education in the curriculum of kindergarten through sixth grade.

September 25, 1969

OPINION NO. 416

Honorable Edward "Doc" Groves
Representative
One Hundred, Forty-Fourth District
2340 East Avenue
Springfield, Missouri 65803



Dear Representative Groves:

This letter is in response to your request for an opinion on the following questions:

1. You understand that it is being made compulsory for students to take mass showers in physical education classes or they will be failed in public hygiene. You "would like to know if this is a compulsory law or an educational ruling."
2. You understand that sex education is being given in kindergarten through sixth grade and you request our opinion as to whether "This is a little early for young persons to be receiving this kind of education and again should not be mandatory."

In addition to reviewing the Missouri statutes, we have reviewed certain publications of the State Department of Education including The School Administrators Handbook (1969), A Guide for Health Education - Grades 9-12 (1961), A Guide for Physical Education in the Elementary School (1963), and A Guide for Physical Education - Grades 7-12 (1960).

The powers and duties of the State Board of Education are set forth in Section 161.092, RSMo 1967 Supp. In subparagraph (2) of that section, the State Board is instructed to "carry out the educational policies of the state relating to public schools that are provided by law and supervise instruction in the public schools."

Section 161.102, RSMo 1967 Supp. and Section 170.021, RSMo 1967 Supp. are the only statutes directly pertaining to physical or health education. Section 161.102 states as follows:

Honorable Edward "Doc" Groves

"The state board of education shall

"(1) Adopt and promulgate rules and regulations deemed necessary to secure courses in physical education to all pupils and students in all public schools and in all educational institutions supported in whole or in part by the state;

"(2) With the advice and cooperation of the director of the state division of health, compile and print a manual of physical education and health supervision and school nurse service to be distributed for use by the teachers, supervisors of physical education, school health supervisors and school nurses of the state."

Section 170.021, RSMo 1967 Supp., providing for instruction in physiology and hygiene, reads as follows:

"Physiology and hygiene, including their several branches, with special instruction as to tuberculosis, its nature, causes and prevention, and the effect of alcoholic drinks, narcotics and stimulants on the human system, shall constitute a part of the course of instruction, and shall be taught in all public schools."

Pursuant to these statutes the State Board of Education has prepared and distributed to the schools certain guides for physical education and health education. Neither the statutes nor the guides published by the State Board of Education require that students take mass showers as a prerequisite to passing a physical education or public hygiene course.

The Board's only physical education requirement is that one unit of credit shall be earned by all high school pupils. See The School Administrators Handbook (1969), pp. 105-106. In A Guide For Physical Education - Grades 7-12 (1960), published by the State Board of Education, the following is all that appears under the heading "What are the State Regulations Concerning Secondary Physical Education?"

"A minimum time allotment of two class periods per week throughout each year of high school should be spent in physical education activities. This minimum should be required of all students for high school

Honorable Edward "Doc" Groves

graduation. In addition, each school should make available to all high school students a minimum of one semester (a one-half unit course) of health instruction and activities including health examinations, health habits and the like. As an alternative many schools are offering a combination of health and physical education, three to five class periods per week for all students. This is a desirable and recommended practice which covers the entire four-year secondary period and which eliminates the necessity of formal classroom instruction in health and hygiene.

"Schools of all classifications, AAA, AA, A, and App, are required to offer one and one-half units of physical education and health (one unit of physical education, and one-half unit of health).

"All teachers of physical education at the secondary level shall possess a baccalaureate degree with a minimum of 24 hours in the field of health and physical education. Eight hours of the 24 should include specific courses in physiology and hygiene." (Id. at 21)

A Guide for Physical Education - Grades 7-12 (1960) mentions showers in two places. In connection with the State Board's recommendation as to the best type of physical facilities for a physical education program, the following appears under the heading "Shower Room":

"The shower room should be located adjacent to the locker room and wall and floor construction should be the same as that of the locker room. The ceiling should be of vapor-proof construction and be recessed. One shower head should be provided for every three pupils with 14 square feet allowed for each shower head. Shower heads should be installed at least 4 feet apart. All showers should be controlled by a water and temperature control.

"At least two dressing booths with partitioned shower should be installed in the

Honorable Edward "Doc" Groves

girls' locker room.

"A toweling room adjacent to the shower room is desirable." (Id. at 38)

In a section which discusses school swimming pools and their construction, the following paragraph appears under the heading "Locker and Shower Rooms":

"Locker and shower rooms should be provided for school and community groups. It is important that these service units be placed adjacent to the pool room. Shower stalls and dressing booths should be provided in the girls' locker room instead of gang showers and dressing facilities because of the anticipated community use of the pool." (Id. at 43)

Similarly, there is no Missouri statute or regulation of the State Board of Education requiring sex education from kindergarten through sixth grade or for any elementary grade. In a publication of the State Board of Education entitled A Guide for Health Education - Grades 9-12 (1961), the health education requirements of the State Board of Education are stated as follows:

"Each high school in the state is required to offer a semester course in health education. This course may be offered on the basis of five classroom periods per week for one semester wherein the pupil receives one-half unit of credit. As an alternate, the course may be offered in combination with physical education on the basis of a minimum of one classroom period per week for four years wherein the pupil receives one-eighth unit of credit per year -- a total of one-half unit for the four years. It should be noted that all students are not required to take this course, but it is an offering requirement for classification of all classes of schools.

"It is understood that the instructor of this course will be a certified teacher in health education, particularly in larger school systems. In the smaller schools, a teacher in a related field with some training in health education may qualify.

Honorable Edward "Doc" Groves

Such a person should have background training in the biological sciences, physiology, preventive medicine, personal and public health, and problems of school health. In either case, the teachers should have a working knowledge of the school health problems, communicable and noncommunicable diseases, systems of the body, dental hygiene, alcohol-narcotic education, nutrition, safety and accident prevention, mental health problems, sex education, sanitation, and related health agencies and organizations on state and local levels." (Id. at 4)

A "Family Living" course is suggested for grade eleven. A brief description of the content of this course is found in A Guide For Health Education - Grades 9-12 (1961):

"This unit is concerned with helping the student be a successful member of his family group now and to help prepare him to accept and fulfill his responsibilities in the future as a parent and adult. This includes learning how to develop good relationships with his own sex, with the opposite sex, and with all ages and groups. It is the function of the school to provide the child with definite opportunities, as a part of the regular school program, to acquire scientific knowledge about growing up under wholesome conditions. School programs should be planned in cooperation with parents, parent groups, and other community organizations, such as health, welfare, church and family life coordinating agencies." (Id. at 15)

Also, there is a recommended course entitled "Systems of the Body." One section of the suggested outline of the content of this course is entitled "What comprises the genito-urinary system?".

We have summarized above all of the statutory requirements, requirements of the State Board of Education, and suggestions of the State Board of Education having to do with either the mass shower or sex education question. As is indicated by the powers and duties of the State Board as set forth in Section 161.092, RSMo 1967 Supp., the State Board performs primarily an advisory function in connection with the curriculum of local school districts. The governing bodies of the school districts in the

Honorable Edward "Doc" Groves

State of Missouri are primarily responsible for the curriculum in their districts. According to The School Administrators Handbook, (1969):

" . . . over 150 Missouri school districts have organized curriculum committees for the purpose of studying 'new' curricular developments in view of implementing the most applicable to their particular need. The state department of education continues to work with statewide curriculum committees in the study and development of course guides as one means of improving instruction at the state level. . . .

"It becomes the responsibility of the school administrators to introduce major curricular change and to provide supportive leadership in its development and implementation. In final analysis, the superintendent of schools is the one person who can marshal the necessary authority by board action to precipitate the decisions necessary for the adoption of curricular development and change." (Id. at 151)

Section 171.011, RSMo 1967 Supp. places on the school board of each school district the responsibility for making the rules and regulations necessary for the operation of that district.

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

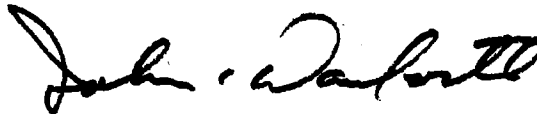
CONCLUSION

In view of the foregoing it is the conclusion of this office that there is no Missouri statute or regulation of the State

Honorable Edward "Doc" Groves

Board of Education requiring students to take "mass showers" or requiring teachers to include sex education in the curriculum of kindergarten through sixth grade.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

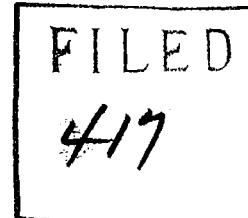
JOHN C. DANFORTH
Attorney General

COUNTIES: The county court of a second class county
TAX LEVY: having anticipated the assessed valuation of
TAXATION: the county to be in excess of \$300 million
cannot consistent with Article X, Section 11(b),
Missouri Constitution, and Section 50.550, RSMo 1959, propose
and adopt a budget for the next fiscal year within which budget
there is a recommendation for a tax levy in excess of 35 cents
per hundred dollars of assessed valuation.

OPINION NO. 417

November 25, 1969

Honorable George W. Parker
State Representative
120th District
819 Chestland
Columbia, Missouri 65201



Dear Representative Parker:

This is in answer to your request for an opinion in which you ask whether the county court of a second class county anticipating an assessed valuation in the year 1970 to be in excess of 300 million dollars can consistent with Article X, Section 11(b), Missouri Constitution, recommend a tax levy in excess of 35 cents per hundred assessed valuation.

As you note, Article X, Section 11(b), of the Missouri Constitution, sets the limits within which the county court may levy a property tax:

"Section 11(b). Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * * * *

"For counties--thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties. . . "

As can be seen, when the assessed valuation of a county reaches 300 million dollars or more, the property tax imposed by the county may not exceed 35 cents on the one-hundred dollars assessed valuation. In this frame of reference, however, the question becomes whether it is incumbent upon the county court,

Honorable George W. Parker

having anticipated as assessed valuation for the coming fiscal year to be in excess of \$300 million, to recommend a budget consistent with Article X, Section 11(b), with the anticipated tax levy not to exceed 35 cents per hundred of assessed valuation.

It would appear that to be consistent with the "County Budget Law," Sections 50.525 - 50.740, V.A.M.S., the county court has the affirmative duty to set forth a comprehensive financial plan and must attempt, as close as is reasonably possible, to propose a balanced budget. Additionally, the budget must set forth in detail the anticipated income and other means of financing the proposed county expenditures. Section 50.550, RSMo 1959:

"The annual budget shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years; all interest and debt redemption charges during the year and expenditures for capital projects. The budget shall contain adequate provisions for the expenditures necessary for the care of insane pauper patients in state hospitals, for the cost of holding elections and for the costs of holding circuit court in the county that are chargeable against the county, for the repair and upkeep of bridges other than on state highways and not in any special road district, and for the salaries, office expenses and deputy and clerical hire of all county officers and agencies. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures. . . ."
(Emphasis added).

Thus, it would appear inconsistent with the duties set out above for a county court which anticipates the assessed valuation of the county to be in excess of 300 million dollars to propose and adopt a budget which recommends a tax levy in excess of 35 cents per hundred dollars of assessed valuation. Therefore, it is the conclusion of this office that the county court of a second class county having anticipated the assessed valuation of the county to be in excess of 300 million dollars cannot consistent with Article X, Section 11(b), Missouri Constitution, and Section 50.550, RSMo 1959, propose and adopt a budget for the next fiscal year within which budget is contained a recommendation for a tax

Honorable George W. Parker

levy in excess of 35 cents per hundred dollars of assessed valuation.

II.

In light of the fact that we have drawn a negative conclusion in respect to the first question you asked, we do not reach your second question in which you requested an opinion on the following:

"Can the county court of a second class county, with an assessed valuation greater than \$300,000,000, levy a tax as per RSMo 137.055 in excess of 35¢ per hundred for that fiscal year, the court previously having adopted a budget as per RSMo 50.610 with a recommended tax levy above 35¢ per hundred assessed valuation for that fiscal year?"

CONCLUSION

It is the conclusion of this office that the county court of a second class county having anticipated the assessed valuation of the county to be in excess of \$300 million cannot consistent with Article X, Section 11(b), Missouri Constitution and Section 50.550, RSMo 1959, propose and adopt a budget for the next fiscal year within which budget there is a recommendation for a tax levy in excess of 35 cents per hundred dollars of assessed valuation.

The foregoing opinion, which I hereby approve, has been prepared by my assistant, Kenneth M. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

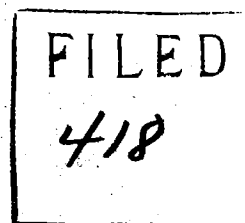
ESCAPE FROM
COUNTY JAILS:

Pursuant to § 557.390, RSMo 1959,
an individual allegedly absent
without leave from the military,
detained by civilian law enforcers is "lawfully imprisoned
or detained . . . upon any criminal charge . . . for the
violation of any penal statute," and may be convicted for
escaping from such detention.

December 24, 1969

OPINION NO. 418

Honorable Edward M. Wetton
Prosecuting Attorney
Carter County
Van Buren, Missouri 63965



Dear Mr. Wetton:

This official opinion is issued in response to your
request for a ruling submitted to this office and asking the
following question:

Can an individual held by a sheriff
in a county jail at the request of
military authorities for allegedly
being absent without leave be prose-
cuted for breaking jail under the
provisions of § 557.390, RSMo 1959?

Section 557.390, RSMo 1959, reads as follows:

If any person lawfully imprisoned or
detained in any county jail or other
place of imprisonment, or in the custody
of any officer, upon any criminal charge,
before conviction, for the violation of any
penal statute, shall break such prison or
custody and escape therefrom, he shall,

Honorable Edward M. Wetton

upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months.

In order for an offense to qualify for prosecution under the foregoing statute section, the persons committing the alleged offense must (1) have been "lawfully imprisoned or detained" and (2) have been so detained by reason of "any criminal charge . . . for the violation of any penal statute." These separate prerequisites shall be considered in reverse order.

The term "criminal charge" has often been afforded a strict construction requiring that a formal charge be actually pending. See United States, v. Patterson, 150 U.S. 65, 68 (1893). However, the term, as used in § 557.390, RSMo 1959, has recently been construed by the Missouri Supreme Court as not requiring procedural formalities. In State v. Testerman, 408 S.W.2d 90, 94 (Mo. 1966), the Court concluded that:

. . . The fact that no charge was pending or warrant issued at the time of the alleged escape would not preclude conviction for escaping custody under § 557.390, RSMo 1959, V.A.M.S. See People v. Serrano, 123 Cal.App. 339, 11 P.2d 81; 30A C.J.S. Escape §5, p. 883. . . .

As we construe the language of the Missouri Supreme Court, one detained, under color of law, by law enforcement officials, may not employ self-help in escaping from such lawful detention under the guise that no formal criminal charge was pending against him. As applied to the case you pose, the detention of a member of the armed forces, at the request of proper military authorities, for allegedly being absent without leave, would qualify as detention "upon any criminal charge" as required to invoke the operation of § 557.390 in the case of escape from such detention.

Section 557.340, RSMo 1959, further requires that the detention be "for the violation of any penal statute." Title 10 U.S.C. § 886, one of the "punitive articles" of the Uniform Code of Military Justice, sets forth the offense of absent without leave as follows:

Honorable Edward M. Wetton

Any member of the armed forces who, without authority--

- (1) fails to go to his appointed place of duty at the time prescribed;
 - (2) goes from that place; or
 - (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;
- shall be punished as a court-martial may direct.

The only requirement of a penal statute is that it be a law imposing a penalty, punishment, or forfeiture recoverable on behalf of the public as by a government. See Tabor v. Ford, 240 S.W.2d 737, 740 (Mo. 1951), where, as in the situation you pose, the interpretation of a federal statute was involved. In our opinion, 10 U.S.C. § 886 is a penal statute as required under § 557.390, RSMo 1959.

The second question, to which we address ourselves, is whether one detained by civil authorities at the request of the military for being absent without leave is, in fact, "lawfully imprisoned or detained." The resolution of this question centers on whether the military has actual authority to make such a request of civilian law enforcement agencies. We find that there is such authority. Pursuant to 10 U.S.C. § 807 (b):

Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. (Emphasis added).

Under the authority of the above section, the following regulations have been established by the Department of the Army:

a. AR 630-10, Section IX, paragraph 41 reads, 'Any civil officer . . . may apprehend an absentee when requested by military authorities';

b. AR 630-10, Section IX, paragraph 45a reads, 'Major CONUS commanders will seek co-operation of local police authorities. They

Honorable Edward M. Wetton

will inform the authorities that the absentee or deserter will be apprehended only upon receipt of DD Form 553 or other confirmed notice that the individual is AWOL and that his return to military control is desired';

c. AR 190-9, paragraph 12 states, 'Major commanders will, whenever necessary, arrange with civil law enforcement agencies for the use, . . . of confinement facilities to detain apprehended absentees';

d. AR 190-9, paragraph 3e states, 'Provost marshals are responsible for initiation of local action to recover reported absentees and for timely notification of such absenteeism to appropriate . . . civilian law enforcement agencies.'

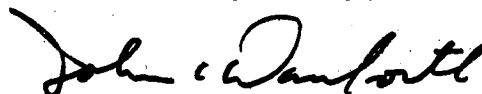
We find these regulations to be valid authority enabling civilian law enforcers to "lawfully imprison or detain" persons absent without leave when requested to do so by the military.

CONCLUSION

It is the opinion of this office, pursuant to § 557.390, RSMo 1959, an individual, allegedly absent without leave from the military, detained by civilian law enforcers is "lawfully imprisoned or detained . . . upon any criminal charge . . . for the violation of any penal statute," and may be convicted for escaping from such detention.

The foregoing opinion which I hereby approve was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General

October 28, 1969

OPINION LETTER NO. 420

Mr. Joseph Jaeger, Jr., Director
Missouri State Park Board
Jefferson Building
Jefferson City, Missouri 65101

FILED

420

Dear Mr. Jaeger:

In your letter of September 12, 1969, you asked for my opinion on the legality of the State Park Board's financial participation in the repair and development of facilities owned or leased by a municipality, county, or other political subdivision.

By statute, the Park Board has been authorized:

" . . . to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. . . ." (Section 253.040, RSMo 1959)

It is my opinion that Section 253.040, read in its entirety, is clear in providing that no authority is given the park board to participate financially in repair, construction and development of lands, or facilities which are owned by municipalities even though there might be some sort of "formal" agreement to permit public use of the facility for park purposes. It seems clear that such section provides that the park board can accept by agreement, lands, or rights in lands, sites, objects or facilities which in the opinion of the park board should be held, preserved, improved and maintained for park or parkway purposes. It appears that it is clear that the last part of such sentence referring to facilities held, preserved, improved and maintained for park or parkway purposes means state park purposes or state parkway purposes. It is also clear that the rights in lands or rights in facilities which are referred to in

Mr. Joseph Jaeger, Jr.

such sentence mean an actual right such as a lease interest or some other interest that the park board has in the land or the facilities. This is amply demonstrated further by the next sentence in such section which provides, that the park board is authorized to improve, maintain, operate and regulate any such lands, sites, objects or facilities when such action would promote the park program and the general welfare. This is obviously a reference to lands or facilities in which the park board has rights and does not apply to a situation where land is held by another and the person owning the land or the municipality owning the land agrees that if the park board will expend money on such property the person or municipality will let the general public use such facilities. There is no right in the park board to expend public monies on private land owned by an individual if there is an agreement made that the private individual will allow the general public to use the facilities. The only power given under Section 253.040, insofar as land owned by an individual or land owned by a municipality or political subdivision is concerned, is that the park board has the right to acquire the land or the facility or a specific actual right in the land or facility, and that such land or facility is to be held, preserved, improved and maintained for state park or state parkway purposes.

Therefore, it is our view that under existing statutory law, the Missouri State Park Board may not financially participate in the repair and development of facilities owned or leased by a municipality, county or other political subdivision.

Yours very truly,

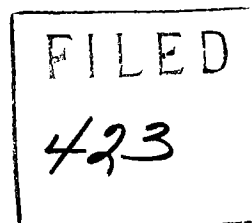
JOHN C. DANFORTH
Attorney General

ANSWER BY LETTER: ASHEY

October 14, 1969

OPINION LETTER NO. 423

Honorable R. Jay Ingraham
Secretary-Attorney
Board of Police Commissioners
1125 Locust Street
Kansas City, Missouri 64106



Dear Mr. Ingraham:

This letter considers your question whether the police of Kansas City can hold an individual more than twenty (20) hours without a warrant if the police require that he furnish a bond guaranteeing his appearance (and he fails to make such bond).

Supreme Court Rule 21.14 reads, in pertinent parts as follows:

"All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense, or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. . . . If the offense for which such person is held in custody is bailable and the person held so requests, he shall be entitled to be admitted to bail in an amount deemed sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. Such admission to bail shall be governed by

Honorable R. Jay Ingraham

all applicable provisions of these Rules. The condition of the bail bond shall be that the person so admitted to bail will appear at a time and place stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him. (Amended April 15, 1958, effective Dec. 1, 1958.)"

The question may be simply put in this fashion, i.e., can the offer of a recognizance by the police be equated to the mandate of the Supreme Court Criminal Rule 21.14, that an accused "shall be discharged from such custody within twenty hours from the time of the arrest unless they be held upon a warrant issued subsequent to the arrest"?

We think not and, therefore, answer your question in the negative.

We have previously ruled on this question in our Opinion No. 59, dated March 1, 1954, to the Honorable Roy W. McGhee, Jr., which is attached. We reaffirm that ruling and again hold that a person arrested, without warrant, may not be held beyond the twenty (20) hour period unless charges are preferred against him by a person competent to testify against the accused and a warrant issued. If the twenty (20) hour period expires on Sunday, a magistrate may entertain a charge filed by a person competent to testify against the accused and issue such warrant.

The fact that the accused may have been offered a recognizance by the police cannot be equated to the requirement of statute and Supreme Court Criminal Rule 21.14 that an accused "shall be discharged from said custody * * * unless they shall be charged with a criminal offense by oath of some credible person, and be held by warrant to answer to such offense."

If you have further questions on this matter, please feel free to submit them to me.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure:

OP.NO. 59, 3/1/54, McGhee

LOTTERIES:

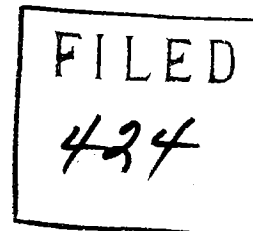
A contest that requires the entrant to go to a store selling the contest sponsor's product or to buy a magazine in order to obtain an entry blank, and in which prizes are awarded based on a drawing from the submitted entry blanks, does constitute a lottery within the meaning of Article III, Section 39, Missouri Constitution, and therefore, is prohibited in Missouri.

A contest that requires the entrants to submit a photograph taken by the entrant, and in which prizes are given, but in which the winners are selected on clearly defined elements of skill, is not a lottery within the meaning of the above cited constitutional provisions, and therefore, is not prohibited in Missouri.

October 30, 1969

OPINION NO. 424

Honorable Jack J. Schramm
State Representative
37th District
7529 Gannon Avenue
University City, Missouri 63130



Dear Representative Schramm:

This is in response to your request for an opinion on whether or not two contest schemes are illegal in the State of Missouri. One contest calls for the participant to obtain an entry blank from a magazine or from a store selling the contest sponsor's clothes. The entrant is then to complete in fifteen words or less the phrase "I never press X Clothes because . . .". The winner of the contest would be selected in a drawing.

The other contest involved the entrant submitting a photograph depicting his "Special Kind of Day". The entrants would be judged on the basis of the interest of the activity shown, composition and basic principals of design and arrangement, and harmony of color or contrast of black and white prints.

While the laws of Missouri do not define the term "lottery", both statute and constitutional provisions prohibit it. Missouri Constitution, Article III, Section 39, sub-section 9, Section

Honorable Jack J. Schramm

563.430, RSMo Supp. 1967. However, the term has received a judicial gloss from the Missouri courts, and has been the subject of opinions of this office. Generally, a lottery is a device whereby a person is offered a chance to receive great gain in exchange for some consideration. The Supreme Court of Missouri said in *State ex inf. McKittrick v. Globe Democrat Publishing Company*, 341 Mo. 862, 110 S.W.2d 705 (Mo. 1937), that a lottery is three elements: consideration, prize, and chance. In view of the constitutional status in Missouri's prohibition of lotteries, these elements should be applied broadly to fulfill the apparent purpose of the prohibition. This office has recently issued a policy statement on this matter. I have enclosed that policy statement for your consideration. Generally, it is the view of this office that consideration within the meaning of the prohibition in the constitution means any "legal consideration", and not just valuable consideration.

In the complete the phrase contest, the elements of chance and prize are clearly present in that the winner will be selected by a drawing and will receive certain rewards for winning. The element of legal consideration is present from the fact that the entrant must either buy a magazine or go to a store, to the entrant's legal detriment, in order to obtain an entry blank.

However, in the Globe Democrat case, supra, the Supreme Court set forth certain standards by which the element of chance could be removed from the contest. These standards included judging the winner on elements of skill. While the photograph contest does require legal consideration on the part of the entrant (the taking and development of a photograph), and prizes are awarded, the entrants will be judged on elements of skill specifically set forth. By determining the contest winners on elements of skill, the element of chance is then removed from the contest.

CONCLUSION

Therefore, it is the conclusion of this office, that a contest that requires the entrant to go to a store selling the contest sponsor's product or to buy a magazine in order to obtain an entry blank, and in which prizes are awarded based on a drawing from the submitted entry blanks, does constitute a lottery within the meaning of Article III, Section 39, Missouri Constitution, and therefore, is prohibited in Missouri.

Honorable Jack J. Schramm

A contest that requires the entrants to submit a photograph taken by the entrant, and in which prizes are given, but in which the winners are selected on clearly defined elements of skill, is not a lottery within the meaning of the above cited constitutional provisions, and therefore, is not prohibited in Missouri.

The above opinion, in which I concur, was prepared for me by my assistant, Thomas L. Patten.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures:

Op.No. 18, 10-21-57, Collet
May 2, 1969, Statement

CRIMINAL LAWS:

A person who knowingly and willfully makes or causes to be made a false report to any peace officer or other official in the state of Missouri whose duty it is to enforce the criminal laws of the state, concerning an alleged crime, has committed a misdemeanor under Section 562.285, RSMo Supp. 1967, and can be prosecuted therefor.

October 9, 1969

OPINION NO. 426

Mr. C. John Forge, Jr.
Assistant County Prosecutor
Thice, Titus, Glasgow, Johnson & Forge
Law Offices
Chrisman Sawyer Bank
Independence, Missouri 64050

Dear Mr. Forge:

This is in response to your request for an opinion as to whether false complaints relative to burglary, assault, and other alleged crimes are violations of any criminal statute.

Section 562.285 (§2), RSMo Supp. 1967, provides, in part, as follows:

"2. Any person who

(1) Knowingly and willfully makes or causes to be made any false report to any peace officer or other official in the state of Missouri whose duty it is to enforce the criminal laws of the state, concerning an alleged crime, or an alleged attempt made or to be made, to do any act which would be a crime prohibited by the statutes of this state, knowing at the time that no crime, or attempt to commit a crime, had been made or would be made; or

(2) Knowingly and willfully imparts or conveys, or causes to be imparted or conveyed false information regarding the presence of any destructive substance in any dwelling house, building, barn, stable, business establishment, schoolhouse or building used as

Mr. C. John Forge, Jr.

such, office or depot, any house of public worship, any bridge, tunnel, viaduct, railway track, roadway, highway, or airport, terminal, or dock, or any aircraft, boat, vessel or other watercraft, railroad train, motor vehicle or other means of transportation, or in any building or property belonging to the United States or to this state, or to any county, city, town or village in this state, or in such location as to be likely to cause injury to any person or damage to any goods, wares, merchandise, property or structure not specifically named herein; or

(3) Knowingly and willfully places any destructive substance or simulated destructive substance in any dwelling house, building, barn, stable, business establishment, schoolhouse or building used as such, office or depot, any house of public worship, any bridge, tunnel, viaduct, railway track, roadway, highway, or airport, terminal or dock, or any aircraft, boat, vessel or other watercraft, railroad train, motor vehicle or other means of transportation, or in any building or property belonging to the United States or to this state, or to any county, city, town or village in this state, or in, or about, any goods, wares, merchandise, property or structure not specifically named herein;

is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars or more than one thousand dollars, or by imprisonment in the county jail for not less than thirty days or more than one year, or by both the fine and imprisonment."

As can be seen from reading this statute, sub-section 1 of sub-section 2, makes it a misdemeanor to knowingly and willfully cause a false report to be made concerning an alleged crime. There is no limitation whatsoever in that sub-section stating that it only applies to false reports concerning the placement of destructive devices. False reports concerning the placement of destructive devices is expressly covered in sub-section 2 of sub-section 2 of Section 562.285. Therefore, it can be assumed that the legislature did not intend to limit the operation of sub-section 1 of sub-section 2 to only those false reports concerning the placement of destructive devices. The express language of the sub-section, and its general terms, indicate that it was intended to cover all situations where false reports were made of an alleged crime.

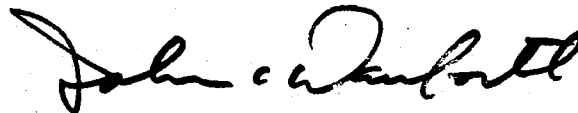
Mr. C. John Forge, Jr.

CONCLUSION

Therefore, it is the conclusion of this office, that a person who knowingly and willfully makes or causes to be made a false report to any peace officer or other official in the state of Missouri whose duty it is to enforce the criminal laws of the state, concerning an alleged crime, has committed a misdemeanor under Section 562.285, RSMo Supp. 1967, and can be prosecuted therefor.

The above opinion, in which I concur, was prepared for me by my Assistant Thomas L. Patten.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

CONSERVATION COMMISSION:
MAGISTRATE COURTS:
LICENSES:
JURISDICTION:
COURTS:

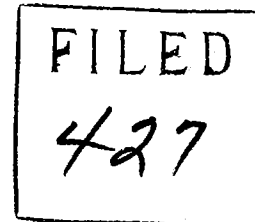
The courts of Missouri do not have jurisdiction to suspend or revoke permits issued by the Conservation Commission and further the Conservation Commission does not have the

power to confer such jurisdiction on the courts and any such rule purporting to confer such jurisdiction is invalid.

OPINION NO. 427

November 6, 1969

Mr. Samuel J. Short, Jr.
Prosecuting Attorney
Cedar County
Second Floor Court House
Stockton, Missouri 65785



Dear Mr. Short:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"I respectfully request an opinion from your office as to the legality of a magistrate judge revoking or suspending for a definite time the hunting and fishing permit and right to hunt within the State of Missouri of a defendant convicted or found guilty of violating the Wild Life Code of Missouri. I am particularly interested of your opinion as to whether Section 2.15B of the Wild Life Code of Missouri permits the suspension or revocation of the permit and the privilege of hunting within the State, as a part of punishment imposed by the sentence.

"I am further concerned as to your opinion if it will be necessary to bring a separate action to have the permit and privilege revoked or suspended wherein the defendant would have notice of the revocation or suspension and be given the opportunity to oppose this particular action.

"If it is your opinion that a magistrate judge

Mr. Samuel J. Short, Jr.

is not granted the authority to suspend or revoke the permit and privilege as part of a sentence, I would appreciate your opinion as to whether the revocation and suspension of the same and the surrender of the hunting and fishing permit could be made a condition of parole on a suspended jail sentence.

"Your consideration in rendering an opinion on this matter will be greatly appreciated."

Article IV, Section 40(a), Missouri Constitution, provides for a conservation commission and reads in part as follows:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. * * * "

Article IV, Section 45, Missouri Constitution, provides for rules and regulations and reads as follows:

"The rules and regulations of the commission not relating to its organization and internal management shall become effective not less than ten days after being filed with the secretary of state as provided in section 16 of this article, and such final rules and regulations affecting private rights as are judicial or quasi-judicial in nature shall be subject to the judicial review provided in section 22 of article V."

The legislature enacted Section 252.040, RSMo 1959, to implement the constitutional provisions and the section reads as follows:

"No wild life shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by such rules and regulations; and any pursuit, taking, killing, possession or disposition thereof,

Mr. Samuel J. Short, Jr.

except as permitted by such rules and regulations, are hereby prohibited. Any person violating this section shall be guilty of a misdemeanor."

Accordingly the Conservation Commission has promulgated rules and regulations known as the Wildlife Code of Missouri. The Wildlife Code essentially governs every aspect of hunting and fishing and the control of wildlife in Missouri. Enforcement of the Wildlife Code is by criminal prosecution for misdemeanors. Sections 252.040, 252.060, 252.090, 252.100, 252.150, 252.160, 252.170, 252.180, 252.190, 252.200, 252.210, 252.220 and 252.230, RSMo. Enforcement of the Wildlife Code by criminal prosecution was upheld in Marsh v. Bartlett, 121 S.W.2d 737 (Mo. 1938).

Rule II of the Wildlife Code contains general provisions for permits. Rule 2.15 provides for the issuance and the suspension or revocation of permits and reads in part as follows:

"A. Permits may be obtained only upon payment to the Commission or its authorized distributing agents at the time of application, the fees fixed by this Code.

"A permit for the taking of wildlife may be issued only to an individual, and may be used only by the individual to whom it is issued. No permit, or special hunting or fishing tag, may be loaned, pre-dated, or altered in any manner. Miscellaneous and commercial permits which do not provide for the taking of wildlife may be issued to a firm, organization or partnership.

"B. The acceptance of a permit shall constitute an acknowledgment by the permittee of his duty to comply with the provisions of this Code and any amendments thereto.

"The Commission reserves the right to deny any permit for cause, but not until applicant shall have been afforded reasonable opportunity to be heard by the Commission or its authorized representative. Any permit may be suspended or revoked for cause by a court of competent jurisdiction." (Emphasis supplied).

Thus, Rule 2.15 purports to confer jurisdiction in the courts to suspend or revoke permits. Your question seems to assume the courts thus have jurisdiction to suspend or revoke and your question is whether a suspension or revocation can be made a part of the criminal punishment imposed by sentence after criminal prosecution.

Mr. Samuel J. Short, Jr.

We do not reach your question because it is our opinion the courts have no jurisdiction to suspend or revoke permits issued by the Conservation Commission and that the Conservation Commission has no power to confer such jurisdiction on the courts.

The source of and right to assume jurisdiction of courts is stated in 21 C.J.S.Courts, Section 28, as follows:

"Jurisdiction, in the general sense, as applied to the subject matter of a suit at law or in equity, must be found in, and derived from, the law which organizes the tribunal; and where there is an absence of power conferred by law a court will not act in the premises. The jurisdiction of courts, as appears in Sections 120-139, flows from constitutional and statutory provisions, and from the common law so far as not repugnant to the federal and state constitutions and laws; and courts can neither assume jurisdiction which is not conferred on them, nor decline, as appears in Section 90 infra, that which is conferred unless they are invested with discretion. * * * "

See Mosely v. Empire Gas & Fuel Co., 313 Mo.225,281 S.W.762,768, 45 A.L.R.1223; and State ex rel. Allen v. Trimble, 317 Mo.751,297 S.W.378,380.

The governmental power to establish courts and to define their jurisdictions is legislative in character, and is limited only by the constitution. State ex rel. Dunham v. Nixon, 232 Mo.98,133 S.W. 336.

It is said in 21 C.J.S.Courts, Section 2, that there are courts of general jurisdiction which are those competent to decide their own jurisdiction and to take cognizance of all causes, civil and criminal, of a particular nature; and that there are courts of special jurisdiction which are those incompetent to decide their own jurisdiction and take cognizance only of a few specified matters. See State v. Daniels, 66 Mo.192 (1877). A court of general jurisdiction when engaged in the exercise of a limited statutory authority is confined to the authority given. American Asphalt Roof Corporation v. Marler, 56 S.W.2d 844 (Mo.App.).

Jurisdiction of courts of general jurisdiction will, in the absence of anything in the record to the contrary, be presumed, but this presumption does not prevail in respect to courts having special and limited jurisdiction. Gibson v. Vaughan, 61 Mo.418. There is no presumption of jurisdiction when a court, though of general jurisdiction, exercises special statutory powers or otherwise than according to the common law, since the court stands on the same footing with courts of limited or inferior jurisdiction. Crabtree v. Aetna Life Ins.Co., 341 Mo.1173,111 S.W.2d 103.

Mr. Samuel J. Short, Jr.

Courts do possess inherent powers which are those necessary for the administration of justice, in order that courts may preserve their existence and function as a court, which powers exist and where merely because it is a court and irrespective of legislative and constitutional grant. State ex rel. Gentry et al., v. Becker, 351 Mo. 769, 174 S.W.2d 181; Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977. The question of jurisdiction is not an inherent power and a court cannot extend its jurisdiction by judicial feat. Schenberg v. Schenberg, 307 S.W.2d 697 (Mo.App.). Nor can parties confer jurisdiction on courts. State ex rel Furstenfeld v. Nixon, 133 S.W.340 (Mo.).

The judicial power of the State of Missouri is vested as provided in Article V, Section 1, Missouri Constitution, as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

The Supreme Court is the highest court in Missouri. Article V, Section 2, Missouri Constitution. The Supreme Court is an appellate court and has exclusive appellate jurisdiction of certain cases as provided in Article V, Section 3, Missouri Constitution.

The courts of appeals in Missouri have jurisdiction of appeals as provided by law from all inferior courts in their districts except appeals within the exclusive appellate jurisdiction of the Supreme Court. Article V, Section 13, Missouri Constitution.

The Supreme Court, courts of appeals and circuit courts have a general superintending control over all inferior courts in their jurisdictions. Article V, Section 4, Missouri Constitution. The Supreme Court may establish rules of practice and procedure for all courts. Article V, Section 5, Missouri Constitution.

Article V, Section 14, Missouri Constitution, establishes the jurisdiction of the circuit courts as follows:

"The circuit courts shall have jurisdiction over all criminal cases not otherwise provided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law. Such courts shall sit at times and places in each county as prescribed by law."

The general statute establishing jurisdiction of the circuit courts is Section 478.070, RSMo, and reads as follows:

Mr. Samuel J. Short, Jr.

"The circuit courts in the respective counties in which they may be held shall have power and jurisdiction as follows:

"(1) As courts of law, in all criminal cases which shall not be otherwise provided for by law;

"(2) Exclusive original jurisdiction in all civil cases which shall not be cognizable before the probate courts and magistrate courts, and not otherwise provided for by law;

"(3) Concurrent original jurisdiction with magistrates in all counties and cities, in all civil actions for the recovery of money, whether such actions be founded upon contract or tort, or upon bond or undertaking given in pursuance of law, in any civil action or proceeding, or for any penalty or forfeiture given by any statute of this state, when the sum demanded, exclusive of interest and costs, shall exceed fifty dollars, and does not exceed the maximum jurisdiction of magistrates in like cases in any such county or city; and also in all such cases where the sum demanded, exclusive of interest and costs, is less than fifty dollars, and wherein there are two or more defendants, not all of whom reside in the same county. And all actions against any railroad company in this state, to recover damages for the killing and injuring of horses, mules, cattle or other animals, without regard for the value of such animals, or the amount of damages claimed for killing or injuring of same, except in all cases where the amount involved is less than fifty dollars. And in all actions and proceedings for the recovery of specific personal property, when the value of the property sought to be recovered, and the damages claimed for the taking or detention of same, and for injuries thereto, shall exceed the sum of fifty dollars, and does not exceed the maximum jurisdiction of magistrates in like cases in any such county or city.

"(4) Appellate jurisdiction from the judgment and orders of county courts, probate courts and magistrates, in all cases not expressly prohibited by law, and shall possess a superintending control over them, and a general control over executors, administrators, guardians, curators, minors, idiots, lunatics and persons of unsound mind."

The jurisdiction of circuit courts in criminal cases is declared

Mr. Samuel J. Short, Jr.

in Section 541.020, RSMo, as follows:

"Except as otherwise provided by law, the circuit courts shall have exclusive original jurisdiction in all cases of felony, and concurrent original jurisdiction with and appellate jurisdiction from magistrates and police courts of towns and cities in all cases of misdemeanor."

There are also numerous statutes conferring jurisdiction, including appellate jurisdiction, in the circuit courts for specific types of cases. We will not list them all here but state that we have found no statute conferring jurisdiction on the circuit courts to suspend or revoke permits issued by the Conservation Commission.

Article V, Section 20, Missouri Constitution, states the jurisdiction of the magistrate courts as follows:

"Until otherwise provided by law consistent with this constitution, the practice, procedure, administration and jurisdiction of magistrate courts, and appeals therefrom, shall be as now provided by law for justices of the peace; and in counties of less than seventy thousand inhabitants magistrate courts shall have concurrent juvenile jurisdiction with the circuit court, and the powers of the circuit judge in chambers when the circuit judge is absent from the county."

Section 482.090, RSMo, implements Article V, Section 20, in civil actions as follows:

"1. Each magistrate shall have jurisdiction co-extensive with his county and the magistrates may organize into a court or courts with divisions.

"2. Except as otherwise provided by law, magistrates shall have original jurisdiction of all civil actions and proceedings for the recovery of money, whether such action be founded upon contract or tort, or upon a bond or undertaking given in pursuance of law in any civil action or proceeding, or for a penalty or forfeiture given by any statute of this state when the sum demanded, exclusive of interest and costs, does not exceed one thousand dollars in counties which now have or may hereafter have not more than seventy thousand inhabitants, one thousand five hundred dollars in counties which now have or may hereafter have more than seventy thousand and less than one hundred thousand inhabitants, two thousand dollars in counties which now have or may hereafter have one hundred thousand or more inhabitants, and in counties which have within their boundaries a city or a part of a city of more than four hundred

Mr. Samuel J. Short, Jr.

thousand inhabitants.

"3. Magistrates shall have jurisdiction of all actions against any railroad company in this state, to recover damages for killing or injuring horses, mules, cattle or other animals within their respective counties, without regard to the value of such animals, or the amount claimed for killing or injuring the same; provided, such magistrates shall have exclusive original jurisdiction in all such cases where the amount involved is less than fifty dollars."

Section 543.010, RSMo, implements Article V, Section 20, in criminal actions as follows:

"Magistrates shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanor, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law."

Thus, none of the provisions cited which relate to the jurisdiction of the appellate courts and circuit and magistrate courts confer jurisdiction in those courts to suspend or revoke permits issued by the Conservation Commission. Nor are we aware of any provision of the constitution or the statutes which confers such jurisdiction in those courts or any other courts in Missouri. In particular neither Article IV, Sections 40(a) through 46, Missouri Constitution, nor Chapter 252, RSMo, both providing for and relating to the Conservation Commission, confer such jurisdiction.

Thus, the courts of Missouri have not been given jurisdiction to suspend or revoke these permits by either the constitution or the legislature, and we find no common law jurisdiction.

Article V, Section 22, Missouri Constitution, does provide for judicial review of the action of administrative agencies, and reads as follows:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

This provision has been implemented by Chapter 536, RSMo, the

Mr. Samuel J. Short, Jr.

Administration Procedure Act.

Such provisions would apply if the Conservation Commission would suspend or revoke a permit and then appeal would be taken to the courts. However, such provisions plainly do not confer jurisdiction on the courts to suspend or revoke.

As to the purported attempt by the Conservation Commission to confer jurisdiction in the courts by administrative rule, it is our opinion that the Commission clearly does not have any such power to do so and the provision in Rule 2.15B is invalid.

Neither the provisions in Article IV, Section 40(a) through Section 46, Missouri Constitution, nor Chapter 252, RSMo, give the Conservation Commission such power.

Furthermore, as stated above, the jurisdiction of the courts is derived from the constitution and the legislature. *Dunham v. Nixon*, supra; *Mosely v. Empire Gas & Fuel Co.*, supra; *State ex rel. Allen v. Trimble*, supra; and 21 C.J.S. Courts, Section 28. Thus, jurisdiction could not be derived from an administrative agency such as the Conservation Commission which is part of the executive branch of government. Article IV, Section 12, Missouri Constitution.

CONCLUSION

It is the opinion of this office that the courts of Missouri do not have jurisdiction to suspend or revoke permits issued by the Conservation Commission and further that the Conservation Commission does not have the power to confer such jurisdiction on the courts and any such rule purporting to confer such jurisdiction is invalid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

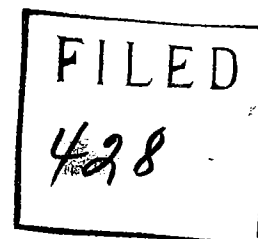
FEEES:
CIRCUIT CLERKS:
COMMON PLEAS CLERKS:
CLERKS OF COURTS OF CRIMINAL
CORRECTION:

The clerks of the common pleas courts, clerks of courts of criminal correction, and circuit clerks to whom House Bill No. 35 of the 75th General Assembly applies should collect the fees therein provided in all cases which are not terminated before October 13, 1969, the effective date of such bill.

OPINION NO. 428

October 14, 1969

Mr. Donald Geers, Circuit Clerk
Twenty-First Judicial Circuit
St. Louis County Court House
Clayton, Missouri 63105



Dear Mr. Geers:

You have requested the opinion of this office as follows:

"Recently the State Legislature revised the taxing of certain court fees relating to criminal and civil matters (See House Bill No. 35).

"This particular bill does not define when this system of flat fee collection should be initiated. At the time this bill becomes law, which is October 13, 1969, the question will arise as to how the clerks in the various jurisdictions will collect those fees as designated in House Bill No. 35 on causes filed prior to that date. We would like an opinion as to a cut-off date on the old manner in which we shall collect these fees relating to causes filed prior to October 13, 1969."

House Bill No. 35 provides as follows:

"Section 1. Sections 483.530 and 483.540, RSMo 1959 are repealed and two new sections enacted in lieu thereof, to be known as sections 483.530 and 483.540 to read as follows:

"483.530. 1. The clerks of the circuit courts, courts of criminal correction, and courts of common pleas of this state possessing criminal jurisdiction shall collect the following fees

Mr. Donald Geers

and no others for their services in criminal proceedings:

"For each criminal case \$7.50

"For each appeal from municipal court . . . 7.50

"The fees collected shall be paid into the county treasury as provided in section 483.560.

"2. No fee shall be charged by any clerk of a circuit court or of a court of common pleas possessing criminal jurisdiction in any criminal cases against the state or any county, unless it is expressly allowed in this section;

* * * *

"483.540. 1. The clerks of the several circuit courts in counties of the first class having a charter form of government and in counties of the second, third, and fourth class, and of the courts of common pleas, shall collect in all civil proceedings the following fees for their services:

"Each civil case, with one defendant. . . \$12.00

"Each additional summons issued for additional defendants 1.00

"Each alias summons issued. 1.00

"Each pluralis summons issued 1.00

"Each third party defendant issued. . . . 1.00

"Each appeal from municipal courts. . . . 10.00

"Each appeal from magistrate courts . . . 10.00
* * *

Prior to this amendment, Sections 483.530 and 483.540 provided a schedule of fees which the clerk was to charge for the services therein described. It is apparent from the amended section that it was the intention of the legislature to eliminate the item by item accrual of fees and substitute therefor a fee schedule.

You correctly stated that the amended Sections 483.530 and 483.540 contained in House Bill No. 35 will become effective October 13, 1969.

Mr. Donald Geers

Since the present Sections 483.530 and 483.540, RSMo 1959, will be repealed as of that date, there will be no authority providing for the further assessment of fees thereafter other than the amended Sections 483.530 and 483.540 as set forth above.

It has long been the rule in Missouri that court costs are governed by statutory provisions and that these statutes are strictly construed. In *Cramer v. Smith*, 168 S.W.2d 1039 (Mo. en banc 1943) the Court quoted with approval the following language from 20 C.J.S., Costs, Section 435, p. 677:

"At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions -- that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed." loc. cit. 168 S.W.2d 1039

Thus, for those cases pending on October 13, 1969, the repealed statutes will not provide authority for fees for services performed subsequent to such date.

Further, in both criminal and civil actions it has been held that the statutory authorization in force at the time of the termination of the action and not during the pendency of the case governs the fees to be charged.

The general rule is stated as follows:

". . . the right to costs and the amount of items taxable are as a general rule governed by the statutes in force at the time of the termination of the action, the time when the right accrues. . . ." 20 C.J.S., Costs, Section 3, p. 263.

Therefore, we conclude that the present schedule of fees should be applied in all cases terminated prior to October 13, 1969, and that the clerk is entitled to collect fees provided for in the fee schedule in House Bill 35 of the 75th General Assembly for all cases not terminated prior to October 13, 1969.

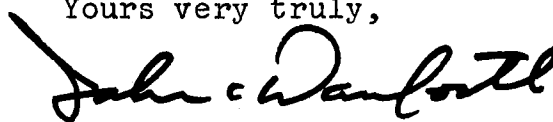
CONCLUSION

It is the opinion of this office that the clerks of the common pleas courts, clerks of courts of criminal correction, and circuit clerks to whom House Bill No. 35 of the 75th General Assembly applies should collect the fees therein provided in all cases which are not terminated before October 13, 1969, the effective date of such bill.

Mr. Donald Geers

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large, sweeping initial "J" and a long, horizontal flourish extending to the right.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

October 6, 1969

OPINION LETTER NO. 431



Mr. William L. Culver
Executive Director
Missouri Law Enforcement
Assistance Council
Department of Community Affairs
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Culver:

You have asked for my opinion if regional law enforcement assistance councils have the status of local government and political subdivisions under Missouri law.

The Omnibus Crime Control and Safe Streets Act of 1968 (PL 90-351; 42 U.S.C.A., §3701, et seq.) provides for planning grants to states to enable state law enforcement planning agencies and units of general local government to institute programs and projects that will improve and strengthen law enforcement.

The Department of Community Affairs was created to, among other things:

"Exercise the state's responsibility for administering, supervising, coordinating and generally performing the role of state government as set forth in those federal programs concerning community affairs which are assigned to the department by the general assembly or by the governor;"
(\$251.030(8), RSMo)

By Executive Order, Governor Hearnes did on August 19, 1968, establish an agency within the Department of Community Affairs for the purpose of implementing the above federal law. This agency, the Law Enforcement Assistance Council, has set up regional councils in Missouri so that local units of government can participate

Mr. William L. Culver

in comprehensive planning for crime control and criminal justice. These councils formulate and supervise the execution of policy for their regions, seek to identify local needs and guide local planning efforts in accordance with general guidelines and priorities of the State Law Enforcement Assistance Council (page 20 of the State Plan.)

The Community Affairs Act defines "political subdivision" as:

" . . . counties, townships, cities, towns, villages, whether or not incorporated, special districts excluding school districts, housing authorities, land clearance for redevelopment authorities, municipal, county, regional or other planning commissions and any other local public body created by the general assembly or exercising governmental functions." (§251.020(6), RSMo; emphasis added)

"Local government" is defined as ". . . any political subdivision of the state;" (§251.020(5), RSMo).

It is my opinion that the activities and responsibilities of Regional Law Enforcement Assistance Councils as delineated in the State Plan can be considered the "exercis[e] [of] governmental functions" Hinds v. City of Hannibal, 212 S.W.2d 401 (Mo. 1948), and it is therefore my opinion that such councils are "local public bod[ies]" (§251.020(6), RSMo).

Accordingly, I am of the opinion that Regional Law Enforcement Assistance Councils established by your agency are local governments and political subdivisions within the meaning of Chapter 251, RSMo.

Yours very truly,

JOHN C. DANFORTH
Attorney General

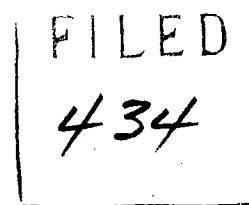
COMMON PLEAS COURTS:
COMPENSATION:
LEGISLATION:
AUDITOR:

The clerk of the Hannibal Court of Common Pleas shall be compensated for the period October 13, 1969, to the end of his present term, December 31, 1970, under the provisions of existing law and of Section 483.455 of House Bill No. 74 of the 75th General Assembly. After such date, he will be compensated as provided in Section 50.335 of House Bill No. 119 of the 75th General Assembly.

OPINION NO. 434

October 9, 1969

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your questions concerning House Bills Nos. 74 and 119 as passed by the 75th General Assembly, to wit:

"1. Are the provisions of the aforesaid Bills effective and operational on and after October 13, 1969?

"2. Is the Clerk of the Hannibal Court of Common Pleas to draw his compensation under H.B. 74 of the 75th General Assembly and Section 483.470, RSMo., 1959 or under H.B. 119 of the 75th General Assembly and Section 483.470, RSMo 1959?

"3. Would the provisions of Article 7, Section 13 of the Constitution of Missouri bar the officials enumerated in the above mentioned Bills from being compensated in the amounts provided therein during their present terms of office when such compensation exceeds that presently provided by law?"

House Bill 74 states as follows:

"483.455. 1. The clerk of the Hannibal court of common pleas shall receive for his services, annually, the sum of two thousand dollars.

Honorable Haskell Holman

"2. For the additional duties imposed upon him by section 514.480, RSMo, the clerk shall receive, annually, the sum of three thousand seven hundred dollars.

"514.480. 1. On the first day of each month each of said circuit clerks shall pay the entire fund created by said deposits during the preceding month to the judge or judges of the circuit court of the county in which such deposits were made, or to such person as the judge or judges of the circuit court of said county may designate as treasurer of said fund, and said fund shall be applied and expended under the direction and order of the judge or judges of the circuit court of any such county for the maintenance and upkeep of the law library maintained by the bar association in any such county or in an adjoining county, or such other law library in any such county, or in an adjoining county, as may be designated by the judge or judges of the circuit court of any such county, provided that the judge or judges of the circuit court of any such county, and the officers of all courts of record of any such county and all attorneys licensed to practice law in any such county, shall be entitled at all reasonable times to use the library to the support of which said funds are applied.

"2. The clerk of any court of common pleas shall, in addition to other duties imposed by law, act as treasurer of said fund for his court, and he shall, at the direction of the judge, or at the direction of the county bar association law library committee, if the judge so directs, expend from the fund for the purpose of maintaining a law library for the court. The clerk shall keep a record of all fees received and expenditures made, and he shall at least once each year present a report of same to the judge of the court and to all members of the county bar association."

House Bill 119 enacts a new section designated as Section 50.335 and Paragraph 1 of that section states in part as follows:

"In all counties having a population of less than five hundred thousand and an assessed valuation of less than three hundred million dollars, the recorder of deeds, the circuit clerk, the circuit clerk-ex officio recorder of deeds, or the clerk of the Court of

Honorable Haskell Holman

Common Pleas, as the case may be, shall receive as total compensation for all services performed by him an annual salary which shall be computed on a combination population assessed valuation basis as set forth in the following schedule."

The first paragraph of amended Section 483.455 as contained in House Bill 74 contains the same provisions as repealed Section 483.455, RSMo Supp. 1967. Paragraph 2 of that section allows the clerk of the Hannibal Court of Common Pleas the additional sum of \$3,700 for additional duties imposed upon him by Section 514.480. House Bill 74 repeals and reenacts Section 514.480 and retains the same provisions in Paragraph 1 thereof, and the same provisions of Paragraph 2 thereof, except that the first sentence of Paragraph 2 is amended to exclude the reference to any court of common pleas "which has county-wide jurisdiction" so that Paragraph 2 now applies to any court of common pleas without regard to whether or not it has county-wide jurisdiction. We note that the Cape Girardeau Court of Common Pleas has power and jurisdiction within the city, township and county of Cape Girardeau, Section 480.020, RSMo 1959, and that the Hannibal Court of Common Pleas has jurisdiction within the limits of Mason and Miller Townships in the county of Marion, Section 480.200, RSMo 1959. Paragraph 2 of Section 514.480, RSMo 1959, therefore presently applies only to the court of common pleas of Cape Girardeau; but under the provisions of House Bill 74, applies also to the court of common pleas of Hannibal.

Therefore, House Bill 74 imposes additional duties upon the clerk of the Hannibal Court of Common Pleas and accordingly the additional compensation provided for therein will be effective as of October 13, 1969, inasmuch as the provisions of the Constitution, Section 13 of Article VII, prohibiting the increase in compensation for such officers in their term would not apply by reason of the additional duties imposed. Mooney vs. County of St. Louis, 286 S.W.2d 763.

It is obvious that the provisions with respect to the compensation of the clerk of the Hannibal Court of Common Pleas as provided for in House Bill 74, Section 483.455 conflicts head-on with the provisions of House Bill 119, Section 50.335 thereof.

It is competent to judicially notice the history of the legislation. State ex rel Karbe vs. Bader, 336 Mo. 259, 78 S.W.2d 835 (1934).

House Bill 74 was passed by the House on February 11, 1969, by the Senate on June 11, 1969, and was signed by both the Speaker of the House and presiding officer of the Senate on June 16, 1969.

Honorable Haskell Holman

It was approved by the Governor on June 18, 1969.

House Bill 119 was passed by the House on March 5, 1969, and by the Senate on June 24, 1969. It was signed by the Speaker of the House on July 7, 1969; signed by the presiding officer of the Senate on July 15, 1969; and was approved by the Governor on August 4, 1969. It is noteworthy also that House Bill 119 did not repeal Section 483.470, RSMo 1959, which allows the clerks of the courts of common pleas the sum of three hundred dollars per annum as compensation for the performance of their duties as members and ex officio clerks of the Board of Jury Commissioners for their respective courts.

House Bills 74 and 119 both repealed Section 483.455, RSMo Supp. 1967. House Bill 119 did not repeal Section 514.480; although as we stated, House Bill 74 did repeal this section and provides a new section in lieu thereof.

We are able to find only one statutory provision with respect to the effect of the amendment of a section by several acts and of conflicts with revising acts. Section 3.065 as amended by House Bill 685 of the 75th General Assembly provides in full as follows:

"1. If any section of the revised statutes, supplement or pocket part, or of any act of the general assembly is amended or reenacted by more than one act at the same session of the general assembly, the section may be incorporated in the revised statutes edition, supplement or pocket part as amended or altered by the several acts if the amendments, changes or alterations can be incorporated in the section in such manner as to make the section intelligible. In any such case the revisor of statutes shall insert a note at the end of the section explaining the insertions or omissions accomplished by the various enactments. If the section cannot be made intelligible by incorporation of the amendments the section as enacted by each of the several acts shall be published in full.

"2. If any section of existing law affected by a revision act is amended, reenacted or repealed by other acts passed at the same regular or extra session of the general assembly, the revision act shall be given effect only to the extent that its provisions do not conflict with the changes made in the existing law by the other acts and, in accordance with this provision, the section shall be shown as

Honorable Haskell Holman

repealed or incorporated in the statutes as amended or altered by the several acts passed affecting it. The revisor of statutes, in such cases, shall insert an explanatory note at the end of the section indicating the changes made in its provisions by the several enactments."

We do not see, however, how the conflict presented by these respective provisions can be resolved under the provisions of the above section.

It is true that Section 483.455 as provided in House Bill 74 has specific reference to the Hannibal Court of Common Pleas whereas the provisions of Section 50.335 as provided in House Bill 119 pertains to all courts of common pleas.

In our view, since the additional compensation provisions of House Bill 74 are in conflict with the total compensation provisions of House Bill 119 and the two cannot be reconciled, the provisions of House Bill 74 providing for such additional compensation, although effective October 13, 1969, become invalid at such time as the total compensation provisions of House Bill 119 become applicable.

With respect to the provisions of Section 483.470, RSMo 1959, we note that this section was not expressly repealed by the provisions of either House Bill 119 or House Bill 74. This section, as we stated, provides for additional compensation for the clerks for the courts of common pleas as compensation for the performance of their duties as members and ex officio clerks of the Board of Jury Commissioners for their respective courts. The provisions of Section 483.470, RSMo 1959, however, are in conflict with the "total compensation" provisions of Section 50.335 as provided in House Bill 119. Therefore, although repeals by implication are not favored, Section 483.470, RSMo 1959, is repealed by implication at such time as Section 50.335 (House Bill 119) becomes applicable.

In our Opinion No. 399, 1969, copy enclosed, to the Honorable William S. Brandom, we considered the effective date of House Bill 119 with respect to the new total compensation schedule as provided in Section 50.335 pertaining to such clerks of the common pleas. We concluded therein that the clerks of the courts of common pleas will not receive the compensation provided by House Bill 119 during their present term if the compensation for such officers provided for by such bill is greater than is now provided by statute for such officers. The total compensation for such officers to be considered is the total statutory salary provided before the effective date of House Bill 119 of the 75th General

Honorable Haskell Holman

Assembly, plus the additional compensation provided by Section 483.455 of House Bill No. 74.

With respect to the Clerk of the Court of Common Pleas of Hannibal, our calculations indicate that the present fixed allowances that he now receives, plus that which he will receive under Section 483.455 of House Bill No. 74, amounts to less than that which he will receive under the new total compensation schedule provisions of House Bill 119. In accordance with our Opinion No. 399, 1969, the new total compensation provisions with respect to such officer is not effective during his present term of office. Accordingly it follows that the compensation provisions of House Bill 74, Section 483.455 and the compensation provisions of Section 483.470, RSMo 1959, will be effective until the end of such clerk's term of office. However, at the end of such term, the provisions of Section 50.335 of House Bill No. 119, are effective and the provisions of Section 483.470, RSMo 1959, and of Section 483.455 as provided in House Bill 74 are then ineffective.

CONCLUSION

It is therefore the opinion of this office that the clerk of the Hannibal Court of Common Pleas shall be compensated for the period October 13, 1969, to the end of his present term, December 31, 1970, under the provisions of existing law and of Section 483.455 of House Bill 74 of the 75th General Assembly. After such date, he will be compensated as provided in Section 50.335 of House Bill 119 of the 75th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

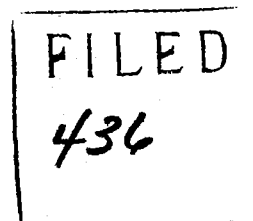
Enc: Opinion No. 399, 1969, Brandom

SCHOOLS:
INTEREST:
BONDS:
SCHOOL BONDS:

The highest rate of interest payable on general obligation school bonds issued by common, six-director, urban or metropolitan school districts in this state is eight per cent per annum.

OPINION NO. 436

October 9, 1969



Honorable Haskell Holman
Auditor of the State of Missouri
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Holman:

This is in response to your request for an opinion from this office concerning the highest rate of interest allowable on general obligation bonds issued by common, six-director, urban or metropolitan school districts.

Sections 164.121, 164.131, and 164.141, RSMo Supp. 1967, set forth the purposes for which general obligation bonds can be issued by such school districts in this state. Section 164.161, RSMo Supp. 1967, provides:

"1. The loans authorized by sections 164.121 to 164.141 shall not be contracted for a longer period than twenty years, and the entire amount of the loans shall at no time exceed, including the present indebtedness of the district, in the aggregate ten per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes. The rate of interest upon the bonds shall, in no case, exceed the highest legal rate allowed by contract. Before or at the time of issuing the bonds, the board of directors shall provide for the collection of an annual tax sufficient to pay the interest and principal of the bonds as they fall due, and to retire them within twenty years from date contracted."

Section 108.170, RSMo Supp. 1967, provides:

Honorable Haskell Holman

"Any and all bonds hereafter authorized to be issued under any law of this state by any county, city, town, village, school district, or other municipality, political subdivision or district of this state, except as otherwise provided in sections 164.121 to 164.301, RSMo, for school districts, may bear interest at a rate not exceeding six per cent per annum, and may be sold, at any sale pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five per cent of the par value thereof, anything in any proceedings heretofore had authorizing such bonds or in any law of this state to the contrary notwithstanding." (emphasis added)

Since §164.161, RSMo Supp. 1967, falls within this exception clause, a determination of the highest rate of interest allowable on a general obligation school bond involves interpretation of the following sentence: "... The rate of interest upon the bonds shall, in no case, exceed the highest legal rate allowed by contract. . . ."

In Missouri, parties may not agree to the payment of interest on money due or to become due upon any contract in an amount exceeding eight per cent per annum. See §408.030, RSMo 1959. It is our opinion that the phrase "highest legal rate allowed by contract" in §164.161 refers to that rate of interest allowable when two parties enter into a written agreement for the payment of interest on money due or to become due upon any contract.

We call your attention to House Bill 2 of the First Extra Session of the 75th General Assembly which was enacted with an emergency clause. Such bill, if approved by the Governor, will become effective on the date of approval if such emergency clause is valid. Such bill deletes the provision in Section 108.170 underlined above and provides that general obligation bonds of the municipalities, political subdivisions, and districts listed in such section shall bear interest at not exceeding six per cent per annum but that such bonds may bear interest at not exceeding eight per cent per annum if sold at public sale after giving reasonable notice of such sale.

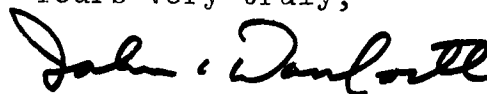
CONCLUSION

Therefore, it is the opinion of this office that the highest rate of interest payable on general obligation school bonds issued by common, six-director, urban or metropolitan school districts in this state is eight per cent per annum.

Honorable Maskell Holman

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

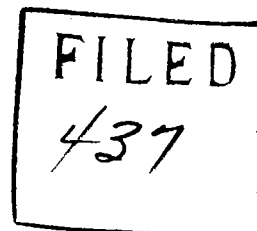
JOHN C. DANFORTH
Attorney General

Answered by Letter
Klaffenbach

October 6, 1969

OPINION LETTER NO. 437

Honorable Reuben R. Rhoades, D.D.S.
Secretary, Missouri Dental Board
415 Central Trust Building
Jefferson City, Missouri 65101



Dear Dr. Rhoades:

This letter is in response to your opinion request concerning whether or not the Missouri Dental Board by regulation can require the practicing dentists or dental hygienists in Missouri to attend and continue an education course relating to the dental field before their annual renewal license could be issued.

While the Board does, under Senate Committee Substitute for Senate Bill 97 of the 75th General Assembly, Section 332.031, have the right to adopt, publish, and enforce such rules and regulations which are within the scope and purview of the provisions of the chapter; nevertheless, the statute prescribes the procedure for renewal, Section 332.181 (S.C.S. SB No. 97) and Section 332.261 (S.C.S. SB 97). We find nothing in these statutes to require that such dentists or dental hygienists attend continuing education courses before receiving their annual licenses and likewise find no authority for the Board under their rule-making power to impose such a requirement.

Yours very truly,

JOHN C. DANFORTH
Attorney General

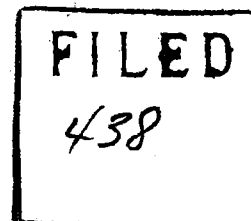
LIMITED DRIVING PRIVILEGES:
MOTOR VEHICLES:
DRIVERS' LICENSES:

The courts have no authority to grant limited or hardship driving privileges to any individual whose license has been revoked for a second conviction for driving while intoxicated under §564.440, RSMo Supp. 1967.

October 7, 1969

OPINION NO. 438

Mr. James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. Schaffner:

This is in reply to your request for an opinion of this office concerning the authority of courts to grant limited driving privileges to individuals convicted twice of driving while intoxicated under §564.440, RSMo Supp. 1967.

We have previously issued Attorney General's Opinion No. 440, dated November 3, 1966, to the Honorable Lawrence J. Lee, holding that limited driving privileges may not be granted to a person convicted of a second offense of operating a motor vehicle while in an intoxicated condition in violation of §564.440, RSMo Supp. 1965. That opinion was based upon the specific language of paragraph (5) of such section which precluded the granting of limited driving privileges after the second conviction. However, since §564.440, RSMo Supp. 1965 was amended in 1967 and paragraph (5) was deleted, Opinion No. 440 is no longer applicable and is being withdrawn.

We nevertheless adhere to the same conclusion for a different reason. §302.309, RSMo Supp. 1967, which is the authority for granting limited driving privileges, specifically provides in subdivision (5) (a) of subsection 3 that:

"(5) No person is eligible to receive hardship driving privilege whose license has been suspended or revoked for the following reasons:

"(a) * * * or who has been convicted for the

Mr. James E. Schaffner

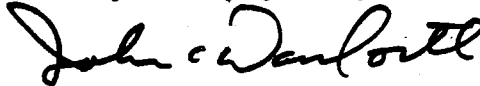
second time for violating the provisions of
section 564.440;"

CONCLUSION

It is our opinion, therefore, that the courts have no authority to grant limited or hardship driving privileges to any individual whose license has been revoked for a second conviction for driving while intoxicated under §564.440, RSMo Supp. 1967.

This opinion, which I hereby approve, was prepared by my assistant Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

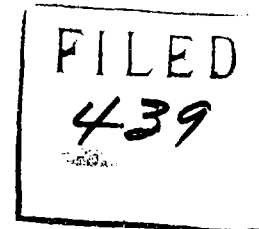
LIQUOR:
INTOXICATING LIQUOR:
LICENSES:

1. An applicant for a liquor license in this state must be denied a license by the Supervisor where he has been convicted under the laws of the United States or of any state of an offense involving a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment to the Constitution of the United States.
2. An applicant for a liquor license in this state must be denied such license by the Supervisor where he has been convicted in another state of an offense not related to any liquor laws but which is a felony under the laws of that state where such conviction disqualifies him from voting under the laws of this state.
3. Where the conviction or convictions are not sufficient to disqualify an applicant on the above grounds, the Supervisor of Liquor Control may refuse to grant such applicant a license where the circumstances surrounding such conviction or convictions are such as to show bad moral character.

OPINION NO. 439

October 30, 1969

Mr. Harry Wiggins, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wiggins:

This is in response to your request for an opinion concerning whether or not a person is entitled to a liquor license issued by the State of Missouri where he has been convicted in another state of a law relating to the sale or manufacture of intoxicating liquor under the laws of that state or where he has been convicted of a felony in that state.

The qualifications necessary for obtaining a license in this state are set out in §311.060, RSMo. 1959. Section 311.060, subsection 1, provides:

- "1. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good

Mr. Harry Wiggins

moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid; provided, that nothing in this section contained shall prevent the issuance of licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by or through a duly licensed wholesaler, within this state."

The authority to determine whether or not an applicant for a state license to sell intoxicating liquor meets these statutory qualifications is vested in the State Supervisor of Liquor Control. See State ex rel. Floyd v. Philpot, 266 S.W.2d 704, 710 (Mo. en banc 1954).

Where the applicant has been convicted in another state, subsequent to the ratification of the Twenty-first Amendment to the United States Constitution, for an offense relating to the sale or manufacture of intoxicating liquor under the laws of that state, the Supervisor of Liquor Control has no discretion in deciding whether or not to allow such an applicant a license. Section 311.060 provides that:

" . . . no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, . . . "

In the case of Wilson v. Burke, 202 S.W.2d 876 (Mo. 1947), the Missouri Supreme Court found a conviction in the United States District Court for failure to pay the occupation tax required by federal law for carrying on the business of a wholesale liquor

Mr. Harry Wiggins

dealer to be sufficient to justify the Supervisor of Liquor Control in refusing to grant a license to an otherwise qualified applicant. The court found that Section 4906, RSMo 1939 (said section is identical to §311.060, subsection 1, RSMo 1959) ". . . merely requires the conviction to be a violation of a law applicable to the sale of intoxicating liquor." Id. at 879. Where the statutes are silent as to whose laws are to be considered in determining qualifications, the Missouri Supreme Court has consistently found no intent on the part of the legislature to disqualify only those who have violated Missouri laws. See State v. Hermann, 283 S.W.2d 617 (Mo. en banc 1955) which reaches this conclusion with respect to juror qualifications, and State ex rel. Barrett v. Sartorius, 175 S.W.2d 787 (Mo. en banc 1943) which reaches this conclusion with respect to voter qualifications. These cases clearly indicate that the Supervisor of Liquor Control cannot issue a license under the provisions of Missouri's Liquor Control Act to an applicant who has been convicted in another state subsequent to the ratification of the Twenty-first Amendment to the United States Constitution of an offense which relates to the sale or manufacture of intoxicating liquor under the laws of that state.

Where an applicant has been convicted in another state for an offense unrelated to the sale or manufacture of intoxicating liquor but which is a felony in that state, the Supervisor cannot grant a license where the offense would be sufficient to prevent the applicant from voting in this state. Section 311.060 provides that an applicant for a license in this state must be "a qualified legal voter." Section 111.021, Senate Bill No. 134, 75th General Assembly provides:

"Only citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, shall be entitled to register and vote at all elections by the people. Each voter shall vote only in the township or election district in which he resides, or if in a town or city, then in the election district or precinct in which he resides. No person who is adjudged incompetent or while confined in any public prison shall be entitled to register and vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to register and vote at any election unless he has been granted a full pardon by the properly authorized state or federal authority."

Mr. Harry Wiggins

This statute is in keeping with Article VIII, §2, Missouri Constitution of 1945 which provides:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people. Citizens of the United States who are otherwise qualified to vote under this section and who have resided in this state sixty days or more, but less than one year, prior to the date of a presidential election may be permitted by law to vote for presidential and vice presidential electors at such election but for no other officers. No idiot, no person who has a guardian of his or her estate or person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting. All persons voting for the presidential and vice presidential electors under the sixty day resident provision shall sign an affidavit as to their eligibility to vote under said section, and any person who falsifies said affidavit shall, upon conviction, be deemed guilty of a felony."

This constitutional provision contains a broad grant of power to the legislature. It contains no language limiting the term "felony" to those felonies committed in the State of Missouri. Neither the constitutional provision nor the statute implementing it can be construed to disqualify from voting only those who have been convicted of a felony in this state. This was the conclusion reached by the Missouri Supreme Court in dealing with the forerunners of the above sections, §2, Article VIII, Missouri Constitution of 1924 and §11469, R.S. 1939. See State ex rel. Barrett v. Sartorius, 175 S.W.2d 787 (Mo. en banc 1943). The Sartorius case has been given wide effect in this state. It was followed by the Kansas City Court of Appeals in determining whether a voter who had been convicted in federal court of violation of income tax laws, which was a felony under federal law even though the voter's conduct which resulted in conviction of this federal felony would have only resulted in a misdemeanor under state law, was properly disqualified as a voter under state law. In Bruno v. Murdock, 406 S.W.2d 294, 297 (K.C.Mo.App. 1966), the court said:

Mr. Harry Wiggins

" . . . Bruno was convicted of a federal felony and under the majority decision in Satorious the judgment of the trial court affirming the action of the Board of Election Commissioners in striking his name from the registration roll of eligible voters was the correct one, notwithstanding that his conduct which resulted in his conviction of a federal felony was then and is now only a misdemeanor in this state. . . ."

Thus, it is clear that the voting restrictions contained in §111.021, Senate Bill No. 134, 75th General Assembly apply to those who have been convicted of felonies in other jurisdictions. Also, it is clear that the law of the jurisdiction where the conviction was rendered will be used to determine whether or not the offense was indeed a felony. Therefore, where the Supervisor of Liquor Control possesses information that an applicant for a state liquor license has been in fact convicted of a felony in another jurisdiction which would be sufficient to deny such applicant the right to vote under the laws of this state, the Supervisor of Liquor Control must refuse such applicant a license under the Liquor Control Act.

Where the offense or offenses against the laws of another state are not sufficient to disqualify one from voting in this state, the Supervisor of Liquor Control may deny the granting of a liquor license if he determines that the circumstances surrounding this conviction or convictions are sufficient to indicate that an applicant with such a record is a person of bad moral character.

CONCLUSION

Therefore, it is the opinion of this office that:

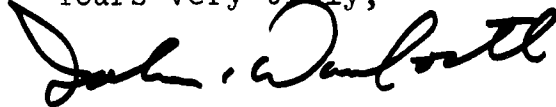
1. An applicant for a liquor license in this state must be denied a license by the Supervisor where he has been convicted under the laws of the United States or of any state of an offense involving a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment to the Constitution of the United States.
2. An applicant for a liquor license in this state must be denied such license by the Supervisor where he has been convicted in another state of an offense not related to any liquor laws but which is a felony under the laws of that state where such conviction disqualifies him from voting under the laws of this state.
3. Where the conviction or convictions are not sufficient to disqualify an applicant on the above grounds, the Supervisor of Liquor

Mr. Harry Wiggins

Control may refuse to grant such applicant a license where the circumstances surrounding such conviction or convictions are such as to show bad moral character.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

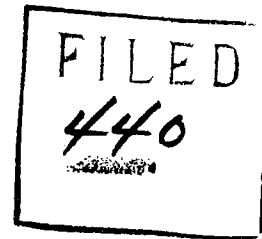
JOHN C. DANFORTH
Attorney General

COMPENSATION:
TEACHERS:
SCHOOLS:
COLLEGES:

Pursuant to Section 174.140, Senate Bill No. 12 Seventy-Fifth General Assembly, a state college board of regents has the discretionary authority to pay as part of an employee's compensation the premium for hospitalization, health or life insurance.

November 18, 1969

OPINION NO. 440



Dr. Ben Morton
Executive Director
Missouri Commission on
Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Doctor Morton:

This letter is in response to your request for an opinion on a question related to Section 174.140, RSMo 1959, as amended by Senate Bill No. 12, Seventy-Fifth General Assembly. Specifically, your inquiry was as follows:

"I have been directed by the Commission to request an interpretation concerning a portion of RSMo. 174.140, relating to the powers of the several state college boards of regents in regard to employees.

"As published, this section reads as follows:

"174.140. Appointment and removal of teachers--retirement plans.--Each such board shall have power to appoint and remove the president or any professor or teacher in any such state college in its district and to fix the duration, terms and conditions of their offices and compensation, and to enter into agreements for and make contributions to both vol-

Dr. Ben Morton

untary and statutory retirement plans for such president, professors and teachers.'

"During the 1969 regular session of the General Assembly an amendment was passed which specifically added the power to provide workman's compensation (Senate Bill 12).

"It is the belief of the colleges and the Commission that types of compensation such as health and life insurance programs, in addition to retirement and workman's compensation provisions, would be beneficial. That is, intelligent implementation of selected programs would assist the colleges in attracting and keeping the qualified people that they need. It is anticipated that such programs, if and when implemented, would be a part of the total compensation package and would not necessarily require additional appropriations per se.

"Therefore, would you please advise us as to whether or not in your opinion reference to compensation in RSMo. 174.140 would allow the state colleges to provide a part of the individual's compensation in such forms as life or health insurance?"

Section 174.140, Senate Bill No. 12, Seventy-Fifth General Assembly, reads as follows:

Each board of regents may appoint and remove the president or any professor or teacher in any state college in its district; may fix the duration, terms and conditions of their offices and compensation; may enter into agreements for and make contributions to both voluntary and statutory retirement plans for the president, professors and teachers; and under rules adopted by the board may extend the provisions of the workmen's compensation law to all employees thereof."

Therefore, we assume that your question is whether state colleges can pay the premium on a life and/or health insurance policy as part of a teacher's compensation.

Prior opinions of this office -- Opinion No. 93 dated September 9,

Dr. Ben Morton

1969 to the Honorable William J. Cason and Opinion No. 452 dated October 23, 1969 to the Honorable Robert H. Branom (copies of which are enclosed herewith) -- have held that a school board, pursuant to Sections 168.101, 168.191, 168.201 and 168.211, RSMo Supp. 1967, may purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district (Opinion No. 93) and may also pay the premiums for hospitalization and health insurance for its employees as part of their compensation (Opinion No. 452). Both of these opinions are based on a holding that the power to pay "wages" "salaries" and "compensation" granted a school board in Chapter 168 constitutes authority to the school board to purchase liability and/or health and accident insurance as part of an employee's total compensation.

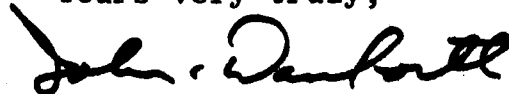
We see no valid reason why "compensation" as used in Section 168.201 should be interpreted differently than "compensation" as used in Section 174.140. Furthermore, we see no meaningful distinction between purchasing life insurance as part of an employee's compensation and purchasing hospitalization and health insurance as part of an employee's compensation.

CONCLUSION

It is the opinion of this office that pursuant to Section 174.140, Senate Bill No. 12 Seventy-Fifth General Assembly, a state college board of regents has the discretionary authority to pay as part of an employee's compensation the premium for hospitalization, health or life insurance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 93,
Cason, 9-9-69

Op. No. 452,
Branom, 10-23-69

TOWNSHIPS:

ASSESSORS:

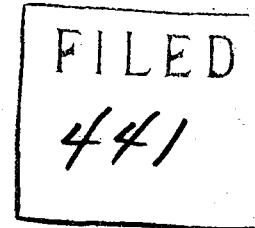
A duly elected township assessor, who subsequently removes his residence from the township, can make the assessments for 1970 unless removed prior to the making of such assessments.

If the assessor is removed prior to making the assessments, it is the duty of the township board to fill such vacancy by appointment. Section 65.200, RSMo 1959.

October 23, 1969

OPINION NO. 441

Honorable William J. Esely
Prosecuting Attorney
Harrison County
P. O. Box 410
Bethany, Missouri 64424



Dear Mr. Esely:

You recently requested an official opinion of this office asking whether a duly elected township assessor, who is now not a resident of the township, can make the assessments for the township in 1970.

In Attorney General's Opinion No. 27, (November 8, 1948) this office held, in response to a similar question, that a township collector by changing his residence to another township does not thereby forfeit his office and may collect taxes in the township in which he is elected until he is removed. The statutory provisions relied on by that opinion are still in effect today, although renumbered. Section 13953, RSMo 1939, is now Section 65.150, RSMo 1959. Section 13962, RSMo 1939, is now Section 65.200, RSMo 1959. Section 12828, RSMo 1939, is now Section 106.220, RSMo 1959. We believe that the holding of the prior opinion which held that a township officer may exercise the duties of his office, despite his non-residency, until he is removed as a result of appropriate legal proceedings is applicable here. Thus, in your case, the elected assessor could make the 1970 assessments, unless removed prior to performing that task.

Honorable William J. Esely

Should the assessor be removed prior to his making the assessments, it would be necessary for the township board to fill this vacancy by appointment. Section 65.200, RSMo 1959.

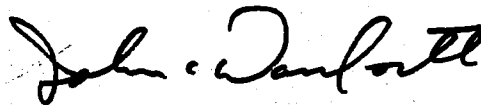
CONCLUSION

Therefore, it is the opinion of this office that a duly elected township assessor, who subsequently removes his residence from the township, can make the assessments for 1970 unless removed prior to the making of such assessments.

If the assessor is removed prior to making the assessments, it is the duty of the township board to fill such vacancy by appointment. Section 65.200, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared for me by my assistant, Peter H. Ruger.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Cp.No. 27, 11-8-48, Evans

October 7, 1969

OPINION LETTER NO. 445
Answered by - Mansur

Honorable Earl Schlef
State Representative
28th District
1672 Maldon Lane
Deildwood, Missouri 63136

Dear Representative Schlef:

This is to acknowledge receipt of your letter of recent date in which you state the members of the Highway Emergency Locating Plan have been authorized to operate the Citizens Band Radio Channel 9 for emergency purposes only and you inquire whether persons who interfere with its use by using profane language over the air, failing to yield to an emergency call, and cutting in on important messages may be prosecuted and which law enforcement agency should be contacted.

The state of Missouri does not have any statute regarding this matter.

18 U.S.C.A. §1464 provides:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

In *Gagliardo v. United States*, U.S. Ct. App. Ninth Circuit 366 F.2d 720, an operator of a Citizens Band Radio was convicted in a federal court of using obscene, indecent and profane language under the above statute.

It is the opinion of this department that any complaint involving the use of profane language or of interference with the use of a radio station should be made to the Federal Communications Commission.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Craft

October 15, 1969

OPINION LETTER NO. 449



Mr. John C. Vaughn, Director
Division of Budget and Comptroller
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Vaughn:

Recently, you contacted me with regard to questions raised by House Bill No. 35 and House Bill No. 49 recently passed by the Seventy-fifth General Assembly and effective October 13, 1969.

Briefly, House Bill No. 35 amends Section 483.530 by substituting a fee schedule for an item by item accrual of fees which the clerks of courts of common pleas having criminal jurisdiction, clerks of courts of criminal correction, and certain circuit court clerks shall collect for performing services.

House Bill No. 49 provides that certain officials are to receive ten cents per mile in reimbursement unless a higher rate is otherwise provided by statute.

With regard to the above legislation, you have raised the following specific questions:

House Bill No. 35:

1. What rule should be utilized by the state in determining when the fee schedule should be utilized for reimbursement for costs?
2. Will the clerks of the circuit court and the clerks of criminal correction each receive \$7.50 where a particular case is handled by each clerk?

House Bill No. 49: (Sec. 57.290)

Does the ten cents per mile reimbursement section govern in Section 57.290 where the sheriff is transporting prisoners.

Mr. John C. Vaughn

House Bill No. 35:

1. With regard to the date upon which the fee schedule should be utilized, this office has prepared an official opinion, Opinion No. 428, which is enclosed.

2. Section 479.330 provides that all provisions of the law concerning costs in criminal cases "shall be held to apply to the St. Louis Court of Criminal Correction." It is apparent from Chapter 479, RSMo 1959, that it is contemplated that proceedings in certain cases will be in both the court of criminal correction and the circuit court. Since House Bill No. 35 repealed Section 483.530, RSMo 1959, under which the St. Louis Court of Criminal Correction was to determine fees and since the amended section specifically applies "for each criminal case" handled by each of the clerks therein listed, it is our opinion that the clerk of the circuit court and the clerk of the court of criminal correction should collect the statutory fees there provided when a case is handled successively by the two clerks.

House Bill No. 49:

Section 57.290 specifies the fee to be paid with regard to the performance of a number of services set out therein. This section provides:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases. . ."

In Section 57.290(3) it is provided:

". . . the sheriff, . . . shall receive seven cents per mile for the distance necessarily traveled in going to and returning from . . ."

In Section 57.290(4) it is provided:

"The sheriff . . . who shall take a person . . . shall be allowed . . . seven cents per mile for every mile necessarily traveled in going to and returning from . . ."

This subsection contains extensive provisions with regard to the transportation of prisoners and the amount to be received by the sheriff for such transportation. The moneys received by the sheriff are not to be retained personally but are to be paid over to the county. The Missouri statutes contain extensive provision for the payment by the officer receiving fees to the county. Thus, the payments made under Sections 57.290(3) and 57.290(4) is as the section denominates it, a fee payable to the sheriff.

Mr. John C. Vaughn

It has long been held in Missouri that fees are dependent upon statute and that these sections are strictly construed. Cramer v. Smith, 168 S.W.2d 1039, 1040 (Mo. en banc 1943).

Thus, it is our opinion that the provisions of House Bill No. 49 should not be interpreted to apply the sections setting forth the mileage allowance paid as a fee. House Bill No. 49 is a reimbursement section and should be interpreted as applying to those situations where the persons there described are entitled to a mileage allowance personally.

I trust that the above satisfies the question which you have with regard to these two legislative enactments. If we can be of further assistance, please feel free to contact me.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 428
10-14-69, Geers

ASSESSOR:
COUNTY ASSESSOR:
PUBLIC RECORDS:

Card Index system kept by assessor
belongs to county.

October 23, 1969

OPINION NO. 450



Honorable Thomas B. Burkemper
Prosecuting Attorney
Lincoln County Court House
Troy, Missouri 63379

Dear Mr. Burkemper:

This is in response to your request for an opinion from this office as follows:

"The assessor of Lincoln County, Missouri, a third class county, elected in November, 1964, and taking office in September, 1965, prepared and started work on a set of cross-index cards which substantially eased the work of the assessor. This set of cross-index cards was not required to be kept up by the assessor under the law. Prior to 1967 all of the work done on that set of cross-index cards, if any, was done at the expense of the assessor out of his own funds. Prior to his taking office, there was a card system in use, which card system was not current, but which had been maintained at the expense of the assessor in office.

"In the 1967 budget at the request of the assessor the County Court budgeted \$1,000.00 for 'making index card filing system' with the understanding that previous indexes were out of date and needed to be brought to date. Subsequently the sum of \$1,000.00 was paid out in wages to the office help of the assessor by the County during the year 1967.

Honorable Thomas B. Burkemper

"Subsequent to the year 1967 the assessor in office claims to have paid out of his own funds a total sum of \$2,896.52 in wages for various ladies to help bring up and keep the system to date. The card system now contains over 10,000.00 cards.

"In September, 1969, a new assessor took office and reported that that portion of the cross-index card system containing an alphabetical listing of property by owner's name was not in the office.

"The assessor leaving office in September, 1969, claims title to the cross-index filing system. The County also claims the system.

"Please advise who is the rightful owner of the system. If you should find that the ex-assessor is the rightful owner, then who is the owner of the \$1,000.00?"

Chapter 109 RSMo, 1959, governs the custody and preservation of public records. Section 109.010 provides:

"If any civil or military officer having any record, books or papers appertaining to any public office or any court shall resign, or his office be vacated, he shall deliver to his successor all such records, books and papers."

We are unable to find appellate court decisions in this state involving this question. Absent a controlling decision by a court of this state, a court decision in another state is persuasive. *Whitehorn v. Dickerson*, 419 S.W.2d 713.

The general rule of law that applies to the ownership of public records is stated in 76 C.J.S. Records §1 as follows:

"A written memorial of a transaction in a public office, when made by a public officer, becomes a public record belonging to the office, and not his private property."

In *Robison v. Fishback*, 175 Ind. 132 (1911) 93 N.E. 666, the county treasurer abandoned a card index system that had been in use prior to the time he assumed office and established a new card index at his own expense of about \$3,000.00, which he kept up and maintained during his term of office and upon going out of office when his term expired, he claimed the cards and cases as his individual property and the right to remove them. In discussing the ownership and right to remove the cards and cases the court stated l.c. 136:

Honorable Thomas B. Burkemper

"The real point in this case turns on the question whether the particular cards and cases have become so essential to the conduct of the office that appellants, in installing them, must be considered as having intended that they should become so much a part of the indispensable accessories of the operation of the office that the public interest requires that they be not removed. It appears from the record that the former system of card indexing was abandoned. Had that been kept up by appellants at their own expense, and for their own convenience, though less efficient than the plan installed, though possibly involving quite as much labor as the new scheme, it could hardly be claimed that appellants could remove it, or even those cards added by their labors or at their own expense.

"This index is not required by any specific law, and it is wholly optional with treasurers whether they keep indexes to these records; but they are so far authorized that the public authorities might contract and pay for their making as conveniences for the use of the officers and the public, and if so procured, while they may not in the strict sense be public records, they are undoubtedly authorized to be made and kept. They are not less public by reason of being made by an officer in the course of his administration of the office. The public have a direct interest in them, not only during the term of office of the incumbent, but indefinitely. State, ex rel., v. Shutts (1904), 161 Ind. 590; State, ex rel., v. Flynn (1903), 161 Ind. 554; Board, etc., v. Mitchell (1892), 131 Ind. 370, 15 L. R. A. 520; Hoffman v. Board, etc. (1884), 96 Ind. 84; Garrett v. Board, etc. (1884), 92 Ind. 518; Hubler v. Board, etc. (1898), 19 Ind. App. 464. It has been held that an index is simply a facility for learning the contents of a record, but not a part of the record itself, unless required by the law to be kept. Bishop v. Schneider (1870), 46 Mo. 472, 2 Am. Rep. 533; Catham v. Bradford (1873), 50 Ga. 327, 15 Am. Rep. 692; Curtis v. Lyman (1852), 24 Vt. 338, 58 Am Dec. 174. These cases arose upon a conflict of interest between third parties, because of the failure of an officer to keep an index, owing to which fact some of them were misled in cases where no index was required as a part of the record.

* * * *

Honorable Thomas B. Burkemper

"The following statement in the case of *Coleman v. Commonwealth*, supra, though obiter, so aptly phrases the matter as to commend itself to our approval and judgment, at least as applied to the facts in this case. 'Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document--a public record belonging to the office and not to the officer; it is the property of the state and not of the citizen, and is in no sense a private memorandum.'

"It is said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done. *Miller v. City of Indianapolis* (1890), 123 Ind. 196; *Commonwealth v. Rodes* (1833), 1 Dana (Ky.) *595; *Cyclopedic Law Dict.*

"The evidence in this case is all to the point that the indexes are indispensable to the discharge of the duties of the office.

"It is said in the case of *People v. Peck* (1893), 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, involving the question of the collection of statistical matter from which compilations are made and reports required to be made: 'He is not to collect the facts merely to enable him to discharge his duty, but in the discharge of a duty.' Here, the treasurer did not prepare the indexes in the discharge of a duty imposed upon him to make them, but to aid him and those succeeding him to discharge the duties of the office; but in the discharge of his duties he did invest the office with facilities for the discharge thereof which are highly essential in the efficient discharge thereof, and in which the public, whose servant he was, are deeply interested. The injury to the public from their removal would be greater than the benefit accruing to appellants, and we think it would be inequitable, when appellants have themselves created the situation, to allow them to disturb it. Because appellants were prevented from removing the cases and cards, it does not fol-

Honorable Thomas B. Burkemper

low that their property is taken without just compensation, nor are they deprived of their property without due process of law. They cannot complain of a condition of their own creating."

This case was cited with approval by our Supreme Court in State ex rel. Kavanaugh v. Henderson 169 S.W.2d 389, a case involving the inspection of public records.

CONCLUSION

It is the opinion of this department that the card index system kept by the assessor of Lincoln County in connection with his work as county assessor and in the discharge of his duties as county assessor is a public record belonging to the office and is not his private property.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

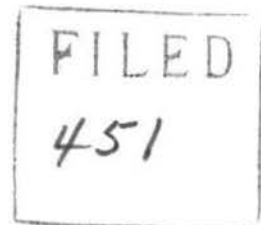
CIRCUIT CLERKS:
ST. LOUIS CITY:

The Clerk of the Circuit Court of the City of St. Louis has the discretionary power and authority to invest funds deposited in the registry of the court in the manner provided in Section 483.310, RSMo 1959, without any action by the General Assembly.

November 13, 1969

OPINION NO. 451

Honorable Richard J. Rabbitt, Member,
Missouri House of Representatives,
68th District
4340 Forest Park
St. Louis, Missouri 63108



Dear Representative Rabbitt:

This official opinion is issued in response to the request contained in your letter forwarding a letter from Mr. Joseph P. Roddy, Clerk of the Circuit Court, City of St. Louis.

The question concerns the legal right of the Circuit Clerk of the City of St. Louis to invest funds in his care. More specifically, as stated in Mr. Roddy's letter, the request arises from the following circumstances:

"Through the many years that preceded my administration, it was the accepted opinion of this office, that the office had no authority to invest the funds of the Court for interest, but simply held the money in escrow.

"It was further their opinion that the law applying to first class counties does not include authorization for the City of St. Louis. Because of this interpretation, it was and is my intention to have the enclosed bill introduced at the next session of the General Assembly.

"However, the question has arisen that we do not need the authorization of the General Assembly and can proceed immediately with in-

Honorable Richard J. Rabbitt

vestment of the funds for interest. We are requesting from you an opinion whether we have this authority to invest the funds for interest without going to the legislature. * * * "

We assume that the "law applying to first class counties" to which reference is made in Mr. Roddy's letter, is Section 483.310, RSMo 1959, which reads as follows:

"The circuit clerks in counties of the first class are hereby authorized and empowered to invest funds placed in the registry of the circuit court in savings deposits in banks carrying federal deposit insurance to the extent of the insurance * * * "

In a prior opinion of this office, i.e., Attorney General Opinion No. 59, dated October 9, 1946, issued to the Honorable David A. McMullan, a copy of which is enclosed, it was determined that under Section 8, Article VI, Missouri Constitution, and C.S.H.B. 476, 63rd General Assembly (now Chapter 48, RSMo 1959), the City of St. Louis is a county of the first class insofar as concerns the application of a statute requiring the payment of certain filing fees or deposits to the clerks of the circuit courts of first class counties. The opinion was rendered for the benefit of Walter H. Toberman, the Clerk of the Circuit Court of the City of St. Louis at that time.

Another opinion of this office, i.e., Attorney General Opinion No. 120, dated September 8, 1966, a copy of which is enclosed, was rendered upon the request of Louise Grant Smith, Clerk of the Circuit Court of St. Louis County. The opinion concludes that the provisions of Section 483.310, RSMo 1959, supra, grant to the circuit clerk of a first class county the discretionary power and authority to invest funds deposited in the registry of the court in the manner provided for in this section. These prior opinions express the official view of this office with respect to the matters considered therein, and it is our opinion that they are applicable to the matter under consideration.

CONCLUSION

It is the opinion of this office that the Clerk of the Circuit Court of the City of St. Louis has the discretionary power and authority to invest funds deposited in the registry of the court in the manner provided in Section 483.310, RSMo 1959, without any action by the General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Encls:
OP.59-46-McMullan
OP.120-66-Smith

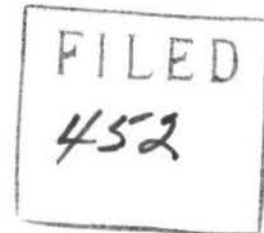
SCHOOLS:
INSURANCE:

A school board has the discretionary authority to pay the premiums for hospitalization and health insurance for its employees as part of their compensation.

OPINION NO. 452

October 23, 1969

Honorable Robert H. Branom
State Representative - 35th District
7701 Forsyth Avenue
Clayton, Missouri 63105



Dear Representative Branom:

This letter is in response to your request for an opinion of this office in which you ask whether school boards can purchase hospitalization and health insurance for their employees as part of the employees' compensation.

As you note, this office has previously, by Opinion No. 93, Cason, 9/9/69, held that a school board has the authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring in the normal activities of a school district as a form of compensation. We see no valid distinction between the purchase of liability insurance as compensation and the purchase of hospitalization and health insurance as compensation.

CONCLUSION

It is the opinion of this office that a school board has the discretionary authority to pay the premiums for hospitalization and health insurance for its employees as part of their compensation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kenneth M. Romines.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 93,
Cason, 9/9/69

INTEREST:
BONDS:
CONSTITUTIONAL LAW:
CITIES, TOWNS & VILLAGES:

(1) House Bill No. 2, as passed by the First Extraordinary Session of the 75th General Assembly, is within the scope of the Governor's special proclamation.

(2) House Bill No. 2 complies with the provisions of Section 23 of Article III of the Constitution which require that no bill shall contain more than one subject which shall be clearly expressed in its title.

(3) The emergency clause contained in Section A of House Bill No. 2 is invalid in that such clause is not "necessary for the immediate preservation of the public peace, health or safety."

OPINION NO. 454

November 4, 1969

Honorable William C. Phelps
State Representative
District 4
5016 Grand
Kansas City, Missouri 64112



Dear Representative Phelps:

This is in response to your request for an opinion concerning House Bill No. 2, as passed by the First Extraordinary Session of the 75th General Assembly and signed by the Governor on October 10, 1969. Specifically, you have asked for our opinion on the following questions with respect to this bill:

1. Does the Act comply with subparagraph (7) of Section 39 of Article III of the Constitution which requires that the Governor's proclamation calling a special session designate the subjects to be covered by the Act?
2. Does House Bill No. 2 comply with the provisions of Section 23 of Article III of the Constitution which requires that no bill shall contain more than one subject which shall be clearly expressed in its title.
3. Does Section A of House Bill No. 2, providing that the Act is an emergency measure, qualify as such under Section 29 of Article III of the Constitution?

Honorable William C. Phelps

By proclamation on August 30, 1969, Governor Hearnes convened an extra session of the 75th General Assembly. Among other things, the Governor requested the legislature to consider "an increase in the interest rate and sale price permitted by law on the bonds of municipalities and other subdivisions and districts of the state." In response to this call, House Bill No. 2 was passed. House Bill No. 2 provides:

"Section 1. Section 108.170, RSMo Supp. 1967, is repealed and one new section enacted in lieu thereof, to be known as section 108.170, to read as follows:

"108.170. Other provisions of law to the contrary notwithstanding, any and all bonds including revenue bonds hereafter issued under any law of this state by any county, city, town, village, school district, educational institution, drainage district, levee district, nursing home district, hospital district, library district, road district, fire protection district, water supply district, sewer district, special authority created under Section 64.920, RSMo, authority created pursuant to the provisions of Chapter 238, RSMo., or other municipality, political subdivision or district of this state shall be negotiable and may bear interest at a rate not exceeding six percent per annum, and may be sold, at any sale pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof, anything in any proceedings heretofore had authorizing such bonds or in any law of this state to the contrary notwithstanding. Such aforementioned bonds may bear interest at a rate not exceeding eight percent per annum if sold at public sale after giving reasonable notice of such sale, at the best price obtainable, not less than ninety-five percent of the par value thereof. Industrial development revenue bonds may, however, be sold at private sale and bear interest at a rate not exceeding eight percent per annum if sold pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof.

"Section A. Because many political subdivisions of this state have found it extremely difficult

Honorable William C. Phelps

and, in many cases, impossible to sell their bonds at six percent interest on the bond market and consequently are unable to build or maintain public utilities and services necessary to the health, safety and well-being of their citizens, this act is deemed necessary for the immediate protection of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval."

In your first question, you ask our opinion as to whether House Bill No. 2, as enacted by the legislature, is within the scope of the Governor's proclamation. Article IV, Section 9, Missouri Constitution of 1945 provides that the Governor, in calling an extra session, shall ". . . state specifically each matter on which action is deemed necessary." Article III, Section 39(7), Missouri Constitution of 1945 provides:

"The general assembly shall not have power:

*

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"To act, when convened in extra session by the Governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly after the convening of an extra session; (Sec. 55, Art. IV, Const. of 1875)"

The scope of the legislature's authority when convened in extra session was discussed extensively by this office in Opinion No. 360, issued October 20, 1965 to Mel Carnahan and Ronald M. Belt. (copy enclosed). On page 13 of that opinion, the following principles were laid forth:

"The Missouri cases make clear that if legislation is enacted at a special session that is outside the 'subject' of the Governor's call or proclamation or message it is void.

"The Missouri cases make clear that the Governor must specifically designate in his call or proclamation for a special session the 'subject' or 'matter' that is to be considered by the legislature.

Honorable William C. Phelps

" . . . the Governor may in his recommendation spell out in detail his ideas and proposals for consideration by the legislature although the legislature is not bound by the specific detail so spelled out by the Governor."

It is our view that House Bill No. 2, as enacted by the 75th General Assembly in extra session, is within the scope of the Governor's proclamation calling for "an increase in the interest rate and sale price permitted by law on the bonds of municipalities and other subdivisions and districts of the state." House Bill No. 2 does deal with the interest rate and sale price allowable on bonds issued by municipalities and other subdivisions and districts of the state. It is true that, with the exception of industrial development revenue bonds, the bill does not authorize a flat increase in the interest rate of bonds of municipalities and other subdivisions and districts of the state, but rather provides that the interest rate on such bonds can be raised from the old level of six percent to eight percent per annum, if sold at public sale after giving reasonable notice of such sale. However, this is a matter of detail only and well within the legislature's authority to legislate upon the subject of the Governor's proclamation or message in any way it sees fit. See State ex rel. Rice v. Edwards, 241 S.W. 945, 948 (Mo. en banc 1922).

In your second question you asked whether House Bill No. 2 complies with the provisions of Article III, Section 23, Missouri Constitution of 1945 which provides in pertinent part:

"No bill shall contain more than one subject which shall be clearly expressed in its title, . . ."

House Bill No. 2 is entitled "An Act to repeal section 108.170, RSMo Supp. 1967, relating to bonds issued by political subdivisions of this state, and to enact in lieu thereof one new section relating to the same subject, within an emergency clause."

The Missouri Supreme Court has ruled in the case of State v. Weindorf, 361 S.W.2d 806, 809 (Mo. 1962) that:

"Section 23, Art. III, of the 1945 Constitution should be liberally construed. In order to satisfy the provision's requirements the title of a statute needs only to indicate the general contents of the act, and if the contents fairly relate to and have a natural connection with the subject expressed in the title they are within the purview of the title. State v. King, Mo., 303 S.W.2d 930, 932[1]."

Honorable William C. Phelps

It is our view that the title of House Bill No. 2 meets the above criteria and therefore is in compliance with the provisions of Article III, Section 23. The title clearly indicates the general contents of the act, i.e., bonds issued by political subdivisions of this state, and the contents of the act, i.e., interest rates and sale prices of such bonds, clearly bear a natural connection to this subject.

Your third question relates to Section A of House Bill No. 2, the so-called emergency clause. Said section provides:

"Section A. Because many political subdivisions of this state have found it extremely difficult and, in many cases, impossible to sell their bonds at six percent interest on the bond market and consequently are unable to build or maintain public utilities and services necessary to the health, safety, and well-being of their citizens, this act is deemed necessary for the immediate protection of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval."

The validity of emergency clauses was discussed at some length in Opinion No. 171, issued April 23, 1963 to M. E. Morris. (copy enclosed). In that opinion we concluded that ". . . a legislative declaration of emergency does not render an act immediately effective unless it is 'necessary for the immediate preservation of the public peace, health or safety' that the act be given immediate effect; . . ." Id. at page 5. This is the test by which an emergency clause must be measured. See also Section 1.130(1), RSMo 1959.

In determining whether or not House Bill No. 2 is indeed an "emergency" measure within the meaning of Article III, Section 29 and Article III, Section 52(a) of the Missouri Constitution and Section 1.130(1), RSMo 1959, it will not be necessary to look beyond the case of State ex rel. City of Charleston v. Holman, 355 S.W.2d 946 (Mo. en banc 1962). In that case, the legislature had undertaken to implement the provisions of Sections 23(a) and 27 of Article VI of the Missouri Constitution. The bill passed by the legislature provided the proceedings required for (1) the issuance of general obligation bonds for a project for industrial development as authorized by Section 23(a); and (2) the issuance of revenue bonds for such a project as authorized by Section 27. In addition, the bill contained the following emergency clause:

Honorable William C. Phelps

"'Since existing laws are inadequate to permit municipalities to promote their industrial development, and since industries desiring to locate in the state of Missouri will not wait for an extended time before making commitments for new locations, and since municipalities within the state of Missouri are presently at a disadvantage in competing with municipalities in other states in attracting new industries, the peace, health and safety of the citizens of the state of Missouri are in jeopardy and an emergency exists within the meaning of the constitution. This act, therefore, shall be in full force and effect immediately upon its passage and approval.'" Id. at page 948

Although it found that the issuance of general obligation bonds for industrial development would no doubt contribute to the public welfare, and indirectly promote the public peace, health, and safety, the Supreme Court could not say with conviction that immediate effectiveness of the act was necessary for the immediate preservation of the public peace, health or safety of the citizens of this state and, therefore, held that no emergency existed within the meaning of Sections 29 and 52(a), Article III of the Constitution. See State ex rel. City of Charleston v. Holman, supra at 952.

Likewise, it is our view that immediate effectiveness of House Bill No. 2 is not necessary for the immediate preservation of the public peace, health and safety, but rather that said act becomes effective ninety days after adjournment of the First Extra Session.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) House Bill No. 2, as passed by the First Extraordinary Session of the 75th General Assembly, is within the scope of the Governor's special proclamation.

(2) House Bill No. 2 complies with the provisions of Section 23 of Article III of the Constitution which require that no bill shall contain more than one subject which shall be clearly expressed in its title.

(3) The emergency clause contained in Section A of House Bill No. 2 is invalid in that such clause is not "necessary for the immediate preservation of the public peace, health or safety."

Honorable William C. Phelps

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 360
1-20-65, Carnahan & Belt

Op. No. 171
4-23-63, Morris

ELECTIONS:
SECRETARY OF STATE:
REFERENDUM:
INITIATIVE:
PETITIONS:

(1) The duty of the Secretary of State with respect to referendum petitions is ministerial rather than discretionary; and if petitions are presented that on their face contain signatures verified as provided

for in Section 126.040, RSMo 1959, your duty is only to determine whether there are sufficient signatures from the prescribed number of congressional districts.

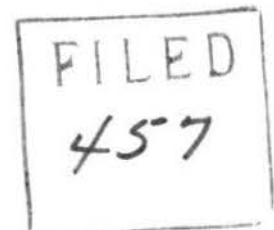
(2) Circulators of initiative and referendum petitions must personally witness the signing of all names that they verified pursuant to Section 126.040, RSMo 1959; however, there may be more than one circulator for each sheet of a petition. The Secretary of State is required to file all petitions that appear, prima facie, to be in order. The validity of petitions which the Secretary files may be contested according to the provisions of Section 126.050.

(3) Elections called by referendum are to be held at the general election in November of even numbered years unless the legislature should designate another date.

OPINION NO. 457

October 24, 1969

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is issued in response to your request for an official opinion on the following questions:

"1. What is the responsibility of the Secretary of State regarding the examination of signatures on such petitions? Is this responsibility simply mathematical, or does it encompass any determination of the validity of signatures, which may or may not ultimately affect the total number of names submitted on the petition?

"2. Similar questions have been asked of this office concerning the verification of the referendum and initiative petitions:

a. Must the circulator of such petitions personally witness the signing of all the names on the petitions?

Honorable James C. Kirkpatrick

b. If more than one person circulates a given petition, must each circulator complete a verification affidavit?

* * * * *

d. In the event information is presented to the Secretary of State that such affidavits have been incorrectly or falsely made:

(1.) Is the Secretary of State required to file such petitions?

(2.) If such petitions must be filed, in what manner may the validity of such petitions be tested?

* * * * *

"3. Section 126.030 RSMo (1959) refers to referendums being submitted at the 'ensuing election,' and Section 126.070 states that the measure is to be voted on at the 'coming General Election.' Furthermore, Article III, Section 52 (b) of the Missouri Constitution states in part:

'All elections on measures referred to the people shall be had at the General State Elections . . .'

"In light of Attorney General Opinion No. 121-1957, would a referendum petition submitted on or before October 13, 1969, be submitted to the people on the August, 1970, Primary Election, or the November, 1970, General Election as stated in the petition."

In answer to the first question it is the opinion of this office that your duty with respect to referendum petitions is to determine that the petitions are prima facie sufficient to meet the requirements of Article III, Section 52(a) of the Missouri Constitution. To perform this duty you must determine that the petitions are signed by five percent of the legal voters (to be computed according to the provisions of Article III, Section 53 of the Constitution) in each of at least two-thirds of the congressional districts of this state. If you decide that the petitions are in order, you are to file the same. Of assistance in determining the prima facie validity of each

Honorable James C. Kirkpatrick

petition will be the verification forms prepared by the circulators of the petitions as provided for in Section 126.040, RSMo 1959. That section reads as follows:

"Each and every sheet of every such petition containing signatures shall be verified in substantially the following form by the person who circulated said sheet of said petition, by his or her affidavit thereon and as part thereof:

State of Missouri,)
) ss.
County of _____.)

I, _____, being first duly sworn, say (here shall be legible written or typewritten the name of the signers of the sheet), signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address and residence correctly, and that each signer is a legal voter of the state of Missouri and county of _____.

(Signatures and post office address of affiant.)
Subscribed and sworn to before me this ____ day
of _____, A.D. 19__.

(Signature and title of officer before
whom oath is made and his post
office address.)

"The forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

We base our opinion on the language found in two Missouri cases. In *Kaesser v. Becker* the court stated:

"The law presumes right conduct rather than otherwise. It presumes that men will not deliberately commit criminal acts. Applying such presumption concretely, when the circulator of a referendum petition makes the statutory affidavit thereto, the law accepts as true the statements made therein until the contrary is shown. This means that the genuineness of the signatures and the correctness of the addresses given and that the signers are legal voters are sufficiently shown by such affidavit to require the secretary of state to accept and file the petition, . . ." 295 Mo. 932, 243 S.W. 346, 350 (en banc 1922)

Honorable James C. Kirkpatrick

In State ex rel. Kemper v. Carter the Supreme Court held:

"We are not saying that the Secretary of State must file a referendum petition upon which either there is not enough congressional districts represented by the signers thereon, or not enough signers from such or any of such districts. But, where prima facie all of these facts appear, he must file the petition as presented to him, and leave to the courts the determination of questions of latent fraud, forgery, and hermetic illegality, for which determination our statutes, it would seem, have provided full and ample machinery for every condition and contingency, and for the protection and safeguarding of both protagonists and antagonists of the act sought to be referred. . . ." 257 Mo. 52, 165 S.W. 773, 781 (1914)

We find, therefore, that the holdings of the Supreme Court of Missouri indicate that your duty with respect to referendum petitions is ministerial rather than discretionary; and if petitions are presented that on their face contain signatures verified as provided for in Section 126.040, RSMo 1959, your duty is only to determine whether there are sufficient signatures from the prescribed number of congressional districts. If you so find you are to file the petitions, request a ballot title from this office (Section 126.060, RSMo 1959) and certify that title to county clerks at the same time you furnish names of candidates for state and county office for the next general election (Section 126.070, RSMo 1959).

In answer to your second question, it is the opinion of this office that the circulator of each sheet of a petition is required by Section 126.040, RSMo 1959, personally to witness the signing of all names on each sheet that he verifies. Since that statute, by its express terms, requires only substantial compliance we see no prohibition against more than one person circulating a sheet of a petition. In that case each circulator should verify the sheet of the petition as to the signatures of those persons who signed in his presence. We deem a sheet of a petition containing the verification of several circulators in substantial compliance with Section 126.040, RSMo 1959.

In the event information is presented to you alleging that affidavits have been incorrectly or falsely made you have no authority to reject such affidavits or the petitions on which they are placed if the affidavits appear on their face to substantially comply with provisions of Section 126.040, RSMo 1959 (see quoted language from Kaesser v. Becker and State ex rel. Kemper v. Carter, supra).

Honorable James C. Kirkpatrick

The validity of any petition accepted and filed by you, may be contested after filing by injunction in accordance with the provisions of Section 126.050, RSMo 1959. That section reads in part as follows:

" . . . On showing that any petition filed is not legally sufficient, the court may enjoin the secretary of state and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and numbers of such measure. All such suits shall be advanced on the court docket and heard and decided by the court as quickly as possible. Either party may appeal to the supreme court within ten days after a decision is rendered. The circuit court of Cole County shall have jurisdiction in all such cases."

In answer to the third question, we are of the opinion that the provision of Article III, Section 52(b) stating:

" . . . All elections on **measures** referred to the people shall be had at the general state elections, except when the general assembly shall order a special election. . . ."

refers to the elections held pursuant to Article VIII, Section 1 which provides:

"The general election shall be held on the Tuesday next following the first Monday in November on each even year, unless a different day is fixed by law, two-thirds of all members of each house assenting."

Therefore, if petitions referring a matter to the people were filed on or before October 13, 1969, the election should be held on November 3, 1970, unless the General Assembly should fix a different date for the general election or order a special election.

We observe that an opinion of this office (Opinion No. 121, 3-6-67, Rothman) referred to in your opinion request held that the term, any general election, used in Article V, Section 29(b) of the Constitution allowed the legislature to designate the August primary as the day for submission of a proposition concerning the Non-Partisan Court Plan to the voters of St. Louis County. We do not believe that the ruling in such opinion has any bearing on the present question for the question asked in that opinion required an interpretation of the words "any general election" as used in Article V, Section 29(b) of the Constitution, while the question you ask depends on the interpretation of the words "the general state elections."

Honorable James C. Kirkpatrick

We see no way to interpret the words "the general state elections" as used in Article III, Section 52(b) to refer to any elections except elections held pursuant to Article VIII, Section 1; for if Article VIII, Section 1 is inapplicable with respect to Article III, Section 52(b), it would likewise be inapplicable in other instances where the Constitution requires an election to be held at the general election.

CONCLUSION

It is therefore the opinion of this office that:

(1) The duty of the Secretary of State with respect to referendum petitions is ministerial rather than discretionary; and if petitions are presented that on their face contain signatures verified as provided for in Section 126.040, RSMo 1959, your duty is only to determine whether there are sufficient signatures from the prescribed number of congressional districts.

(2) Circulators of initiative and referendum petitions must personally witness the signing of all names that they verified pursuant to Section 126.040, RSMo 1959; however, there may be more than one circulator for each sheet of a petition. The Secretary of State is required to file all petitions that appear, prima facie, to be in order. The validity of petitions which the Secretary files may be contested according to the provisions of Section 126.050.

(3) Elections called by referendum are to be held at the general election in November of even numbered years unless the legislature should designate another date.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



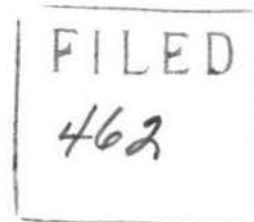
JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

October 27, 1969

OPINION LETTER NO. 462

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County Court House
Cape Girardeau, Missouri



Dear Mr. Seier:

You have asked for my opinion if the Cape Girardeau County Coroner is entitled to mileage under Section 58.090, RSMo, for necessary use of his automobile in line of duty.

I am enclosing two earlier opinions of this office ruling that a second class county collector and a second class county assessor may be reimbursed by the county court for travel expenses actually and necessarily incurred in the performance of their official duties.

I believe that the rationale and result of these opinions should apply to a second class county coroner.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 283
9-10-63, Hollingsworth

Op. No. 29
3-11-64, Burrell

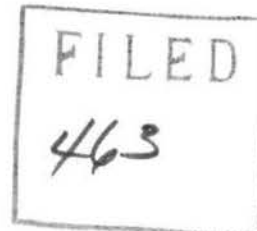
CRIMINAL LAW:
RECEIVING STOLEN GOODS:

Person charged with receiving stolen property may be prosecuted in any county in which he is shown to have been in possession of the property.

OPINION NO. 463

October 30, 1969

Honorable C. M. Bassman
State Representative
House District 106
9th & Gutenberg
Hermann, Missouri 65041



Dear Mr. Bassman:

This official opinion is issued pursuant to your request of October 11, 1969, in which you ask the opinion of this office with regard to a fact situation substantially as follows:

Property is stolen in County A, delivered to the defendant in County B, and then transported by the defendant into County C, where he sells it.

You ask whether defendant may be prosecuted in County C on charges of receiving stolen property in violation of Section 560.270, RSMo 1959. This section provides the same penalties for receiving stolen property as are prescribed for stealing.

Section 541.060, RSMo 1959, provides in part as follows:

"When any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding such theft or embezzlement was committed in another county." (Emphasis supplied)

Section 541.070, RSMo 1959, provides for the prosecution of the alleged thief rather than of the receiver, and permits such prosecution "... in the county into which such stolen property was brought ...". This section is of assistance in construing Section 541.060, even though it is not directly in point in a "receiving" case.

Honorable C. M. Bassman

We find no judicial construction of Section 541.060, but Section 541.070 has been construed in several cases. In *State v. Smith*, 66 Mo. 61 (1877), it is said that each asportation of stolen property into another county is a separate offense for venue purposes. In *State v. Crow*, 337 Mo. 397, 84 S.W.2d 926 (1935), the court said that a defendant charged with stealing personal property could be tried in any county into which he has brought the property, and that this includes a county which he simply passes through on his way to a destination beyond.

The evident purpose of the venue provisions of Section 541.070 is to facilitate the prosecution of persons charged with stealing, without the need for aborting prosecutions if it is shown that the actual theft occurred in another county.

We consider that Section 541.060 has a similar purpose. In this connection the words, "or had" are of particular significance. These words can logically be construed as meaning that one charged with receiving stolen property may be charged and tried in the county in which he receives the property, or in any other county into which he is shown to have been in possession of the property. Words of a statute are presumed to serve some purpose, and a construction which would render them meaningless is avoided if possible. The words, "or had" necessarily refer to some county other than the county in which the property is received. Otherwise, they would be without meaning or significance. The meaning we suggest is a reasonable one and would be in accordance with the purpose of the venue statutes for stealing cases as discussed above.

If a person receives stolen goods in one county and takes them into another county where he sells them, then, he may be tried and convicted in the latter county.

Section 541.033, RSMo Supp. 1967, is a general venue statute for criminal offenses, actually representing an extension of the general venue provisions of Section 541.030, RSMo 1959. Both of these statutes by their terms apply ". . . except as may be otherwise provided by law." The provisions of Section 541.060, relate specifically to the offense of receiving stolen property, and these specific provisions prevail over the general provisions of Section 541.030 and 541.033. There is no reason to think that the legislature in enacting the latter section in 1965 had any purpose of repealing Section 541.060. The language of 541.033 shows expressly that there was no such intention.

Honorable C. M. Bassman

CONCLUSION

It is the opinion of this office that an individual who allegedly receives stolen property in one county and takes it into another county where he sells it, may be prosecuted in either of these counties.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,

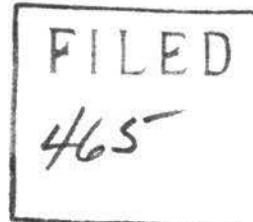
A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

October 27, 1969

OPINION LETTER NO. 465
(Answered by letter-Nowotny)

Mr. James E. Schaffner
Acting Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in answer to your request for an official opinion of this office concerning the question whether chauffeurs' licenses are required when mechanics employed by a business firm which operates a fleet of trucks, drive trucks to the point where a vehicle of a company has broken down in order to repair such vehicle. You have stated that the mechanic is required to go to the point of breakdown "on some occasions" and that out of approximately thirty mechanics "there is no one mechanic who will normally perform this work and the job will be assigned to whomever is readily available."

Section 302.020, RSMo Supp. 1967, requires a chauffeur of any vehicle to have a valid chauffeur's license.

Chauffeur is defined in Section 302.010(1), RSMo Supp. 1967, as follows:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle;

Commercial motor vehicle is defined in Section 302.010(3), RSMo

Mr. James E. Schaffner

Supp. 1967, as follows:

"(3) 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers;"

Enclosed is a copy of Attorney General Opinion No. 227, dated August 5, 1964, issued to the Honorable Bill D. Burlison, which held that a sheet metal worker is not required to have a chauffeur's license to operate his employer's trucks if the trips are so occasional and infrequent that they are not part of the employee's duties.

It is our opinion that Opinion No. 227 applies here and therefore the mechanics involved do not have to obtain chauffeurs' licenses.

Very truly yours,

JOHN C. DANFORTH
Attorney General

encls.

ARCHITECTS:

1. Section 327.030 and Section 327.271, RSMo 1959, which authorized the predecessor of the Missouri State Board for Architects, Professional Engineers and Land Surveyors to issue special permits to architects and to collect fees when such permits were renewed, were repealed when Senate Bill 117 of the 75th General Assembly became law on October 13, 1969, and 2. Senate Bill 117 does not authorize the Missouri Board for Architects, Professional Engineers and Land Surveyors to renew, or collect renewal fees for the renewal, of special permits issued before Sections 327.030 and 327.271 were repealed.

OPINION NO. 466

December 16, 1969

Mrs. Olean Barton, Secretary-Treasurer
Missouri Board for Architects,
Professional Engineers and Land Surveyors
Post Office Box 184
Jefferson City, Missouri 65101



Dear Mrs. Barton:

Your request for an official opinion from this office reads as follows:

"Chapter 327, RSMo 1959, authorized this Board to issue special permits for a single project and also authorized their renewal annually on payment of a \$10.00 renewal fee.

"It often happens that a project cannot be completed in one year and the architect or professional engineer requests renewal of his permit for another year.

"Senate Bill 117, passed by the 75th General Assembly, effective on October 13, 1969, eliminated special permits and made no provision for collection of a renewal fee for those permits previously issued under the provisions of Chapter 327, RSMo 1959.

"Please advise if this Board is authorized to collect renewal fees on and after October 13, 1969, on special permits issued previous to that date."

The special permits to which you refer were authorized and issued pursuant to paragraph 5 of Section 327.030, RSMo 1959, which reads as follows:

Mrs. Olean Barton

"In lieu of registration under any provision of this subsection, any registered architect, shown by the official certificate of another state board to have been in good standing on its records as a registered architect continuously during a period of at least five years next preceding the date of such certificate, and actively engaged in the practice of architecture during said period, may on payment of the fee required by law, secure a special permit for any single employment or project in this state, described in his request for such permit. Such special permit shall be renewable from year to **year** through the course of such single employment or project, on payment of the fee required by law for such renewal."

The collection of renewal fees was authorized and provided for in Section 327.271, RSMo 1959, as follows:

"For the official service of the board there shall be paid to the collector of revenue, in advance, fees as follows:

* * * *

"(12) For temporary permit, twenty-five dollars; for annual renewal thereof, ten dollars;"

Section 1 of Senate Bill 117, 75th General Assembly, begins with the words "Chapters 327 and 344, RSMo, are repealed . . ." Thus both of these sections from Chapter 327 were repealed by Senate Bill 117. Accordingly, after Senate Bill 117 became effective on October 13, 1969, there could be no authorization for the issuance or renewal of special permits under Section 327.030(5), or the collection of renewal fees under Section 327.271(12) unless it could be held that the recent action of the legislature failed to remove all effect of these sections or that while the sections were in existence, those qualified thereunder acquired rights of which they could not be divested by subsequent legislative action.

In *City of St. Louis v. Kellman*, 139 S.W. 443, 445 (Mo. 1911) the court said:

"[2] Attending to that term, what does the word 'repeal' mean, when used by lawmaker or judge? 'Repeal' is defined as the abrogation or annulling of a previously existing law by the enactment of a subsequent statute, which either

Mrs. Olean Barton

declares that the former law shall be revoked and abrogated, or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two can stand in force; the latter is the 'implied' repeal heretofore mentioned; the former, the 'express' repeal. Black, L. Dict. tit. 'Repeal.' Bouvier defines it to be: 'The abrogation or destruction of a law by a legislative act.' Bouv. L. Dict. tit. 'Repeal.' (Note the word 'destruction.') Webster defines it: 'To recall; to rescind or abrogate by authority; to revoke.' He gives among its synonyms 'annul,' 'cancel,' 'reverse,' 'abolish.' He defines the noun 'repeal' as meaning 'revocation'; 'rescission'; 'abrogation.' Abrogate, in turn means to annul by an authoritative act; to abolish by the authority of the maker; to repeal. Other instructive shades of meaning come out in accredited definitions of the several synonyms, but the foregoing are enough for our purpose. . . ."

This case was followed by the Supreme Court in *State ex inf. Crain ex rel. Peebles v. Moore*, 99 S.W.2d 17, 19 (Mo. en banc 1936) where the court said:

" . . . The repeal of a law means its complete abrogation by the enactment of a subsequent statute. . . ."

In view of these decisions, it is apparent that Senate Bill 117 effected an "express repeal" of Sections 327.030 and 327.271, RSMo 1959, thereby completely eliminating them from legal existence.

It is well settled that a right cannot be regarded as vested unless it amounts to something more than the mere expectation of the continuance of existing law. In *Curators of Central College v. Rose*, 182 S.W.2d 145, 148 (Mo. 1944) the court said:

" . . . No person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (citing case). 'Neither corporations nor citizens of a state have any vested right in its statutes.' . . ."

The General Assembly in exercising its police power has enacted Senate Bill 117 to prescribe qualifications for the right to practice

Mrs. Olean Barton

architecture in Missouri. No person may acquire a vested right to practice, without a license, a profession controlled by the police power of the state.

The case of State v. Davis, 92 S.W. 484, 489 (Mo. 1906) grew out of a conviction of the defendant for practicing medicine without a license. One of the defenses advanced therein was that the defendant had engaged in the practice of medicine in Missouri almost fifty years prior to the enactment of the statute under which he was being prosecuted and that he had thereby secured the right to practice without obtaining a license. The court held with respect to this contention, l.c. 489:

" . . . It is apparent that the General Assembly of Missouri, in the enactment of the provisions of law regulating the practice of medicine and surgery in this state, intended to fix a standard as to fitness, skill, and qualification which would authorize the practice of that profession. This law does not undertake to deprive any person of a vested right, for there can be no such thing as a vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice of medicine or surgery, nor to prohibit any particular person from practicing as a physician or surgeon, but it simply undertakes to require the necessary and essential qualifications for that purpose. The correctness of the conclusions as herein indicated are fully supported by the well-considered cases of this country (citing cases). We see no necessity for pursuing this subject further. It is clearly manifest that the defendant had no vested right to practice medicine in this state by virtue of his former practice here in 1857. Upon returning to this state to practice his profession, his qualifications, fitness, and skill to do so must be judged by the law in force at the time he so returns, and before he will be authorized to engage in the practice of his profession and reap the rewards from such practice, there is no reason why he should not comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice."

The Davis case was followed by the Supreme Court in State ex rel. Collet v. Errington, 317 S.W.2d 326, 330 (Mo. 1958) in which

Mrs. Olean Barton

the court ruled that a person had no natural right to engage in the practice of naturopathy without benefit of a license to practice medicine.

Persons who contract concerning matters which may be regulated by virtue of the police power of government necessarily enter into their engagement subject to the possible exercise of that power, although it may be latent at the time the agreement was made. 11 Am.Jur., Section 264, Page 1000.

Section 327.381 of Senate Bill 117 provides:

"The board may in its discretion issue a certificate of registration to any architect . . . who has been registered in another state, . . . provided that the board is satisfied . . . that his qualifications for registration are at least equivalent to the requirements for initial registration in Missouri . . ."

Thus, it clearly was not contemplated by the General Assembly when it passed Senate Bill 117 that there should be two groups of recognized architects in this state, or that part should be issued certificates of registration and part should be issued special permits.

CONCLUSION

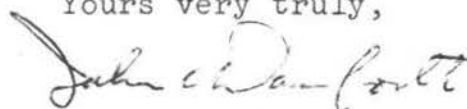
Therefore it is the opinion of this office that:

1. Section 327.030 and Section 327.271, RSMo 1959, which authorized the predecessor of the Missouri Board for Architects, Professional Engineers and Land Surveyors to issue special permits to architects and to collect fees when such permits were renewed, were repealed when Senate Bill 117 of the 75th General Assembly became law on October 13, 1969, and

2. Senate Bill 117 does not authorize the Missouri Board for Architects, Professional Engineers and Land Surveyors to renew or collect renewal fees for the renewal, of special permits issued before Sections 327.030 and 327.271 were repealed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,



JOHN C. DANFORTH
Attorney General

TAXATION (INHERITANCE TAX):

When a testator leaves realty to a husband and wife subject to a life interest in two individuals and the will provides that the grantees of the life interest must pay rent in a specified sum to the remainder interest, under Section 145.200, RSMo 1959, the value of the life interest is reduced by the rent payments and the value of the remainder is increased by the same amount.

OPINION NO. 467

November 4, 1969

Mr. James E. Schaffner,
Acting Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. Schaffner:

This is in reply to your request for an official opinion of this office concerning the Missouri inheritance tax that should be assessed in a case when property was left to a husband and wife subject to a life interest in two individuals, the will providing that the individuals who were left a life estate would pay rent in a specified sum to the husband and wife.

Section 145.020, RSMo 1959, imposes a tax upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to certain persons upon the death of the donor in certain enumerated cases.

In this case realty was devised to one couple, with a life interest in another couple, and, thus, tax is due under Section 145.020. In question is the value of the two gifts for determining the inheritance tax in view of the fact that the will requires that the grantees of the life estate pay rent to the remaindermen.

Section 145.200, RSMo 1959, provides for the valuation of life estates and reads in part as follows:

"When any property, interest therein or income therefrom belonging to any estate in course of administration, shall pass or be limited for the life of another or for a term of years, or to terminate on expiration of a certain period, the value of

Mr. James E. Schaffner

property at the date of death so passing shall be determined by appraisal for the purpose of taxes under this chapter immediately after the death of the decedent and the value of said life estate, term of years or period of limitation, shall be valued according to mortality tables, using the interest rate or income rate of five per cent, and the value of the remainder in said property so limited shall be ascertained by deducting the value of the life estate, term of years or period of limitation from the clear market value of the property so limited * * * ".

You have stated to us that the real estate is valued at \$4,500 and that using the formula provided for in Section 145.200, the value of the life estate is \$1,406.48. Normally, then, the tenants with a life interest would pay a tax based on the value of \$1,406.48 and the remaindermen would pay a tax based on the value of \$3,093.52. However, since the tenants with a life interest must pay \$35 per month rent, does this reduce the value of the life estate? Also, what is the effect on the value of the remainder?

The Missouri inheritance tax is a tax on the right to receive or take property and not on the right to transfer property after death, and hence the incidence of the tax falls on the recipient of the property and the amount of the tax is determined by the net value of the property received by the beneficiary. In re McKinney's Estate, 351 Mo.718, 173 S.W.2d 898,900-901.

Since the tenants given a life interest must pay rent for the realty, it is our opinion that the net value of the life estate is determined by deducting such rent payments. See In re Hart's Estate, 3 Ohio App.2d 129, 209 N.E.2d 636; and Hagy v. Kelly, 135 N.J.Eq.436, 39 A.2d 386.

This being the case the value of the remainder interest is then increased by the same amount since the statute directs that the value of the remainder interest is determined by deducting the value of the life estate.

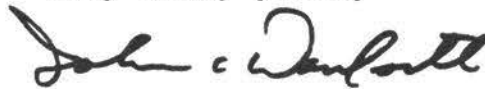
CONCLUSION

It is the opinion of this office that when a testator leaves realty to a husband and wife subject to a life interest in two individuals and the will provides that the grantees of the life interest must pay rent in a specified sum to the remainder interest, that under Section 145.200, RSMo 1959, the value of the life interest is reduced by the rent payments and the value of the remainder is increased by the same amount.

Mr. James E. Schaffner

The foregoing opinion, which I hereby approve, was prepared
by my assistant Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Answer by letter-Craft

December 19, 1969

OPINION LETTER NO. 469

Honorable Robert H. Branom
State Representative, District 35
7701 Forsyth, Room 574
Clayton, Missouri 63105



Honorable Kenneth J. Rothman
State Representative, District 36
130 South Bemiston Avenue
Clayton, Missouri 63105

Dear Representatives Branom and Rothman:

In your recent letter you asked the following question with regard to House Bill No. 169 which was adopted by the 75th General Assembly:

"The question is: Can a Sheriff and Constable charge mileage in addition to the \$5.00 charge on an original summons or writ?"

House Bill No. 169 adopted by the 75th General Assembly provides:

"Section 1. Chapter 57, RSMo, is amended by inserting therein a new section to be known as Section 57.286, to read as follows:

"57.286. In all class one counties having a charter form of government the fees to be charged for the services of the sheriff shall be as follows:

"For summoning a standing jury, for
each juror summoned. \$.50

Honorable Robert H. Branom
Honorable Kenneth J. Rothman

"For serving every summons or original writ and returning the same for the first defendant. 5.00

"For serving every summons or original writ and returning the same for each succeeding defendant. . . . 1.50

"For serving a writ of scire facias or attachment for each defendant. . 1.50

"For taking and returning every bond required by law. 1.00

"For serving a writ or order of injunction for each defendant. . . 1.50

"For serving a habere facias possessionem or sequestration. 2.00

"For levying every execution . . 3.50

"And when served on real estate, the officer shall be bound to go on the land, or sufficiently near it, if necessary, in order to describe it properly. For making, executing and delivering a sheriff's deed, to be paid by the purchaser, all tracts of land purchased at the same sale to be included in one deed, if the purchaser desires it. . . 5.00

"For every return of non est on a writ, original or judicial . . . 1.00

"For return of nulla bona. . . . 1.00

"For executing a writ of ad quod damnum in any case drawing the inquisition and return the same 2.00

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage

Honorable Robert H. Branom
Honorable Kenneth J. Rothman

shall not be charged for more than
one witness subpoenaed or venire
summons or other writ served in the
same cause on the same trip. . . .10
#"

The portion of House Bill No. 169 set forth above, and the balance of the bill which is not set out is intended to specify the fees to be charged by the sheriff for the services therein provided. The second item indicates that the sheriff is to charge \$5.00 for serving "every summons or original writ and returning the same for the first defendant." The last item set forth above provides for the charge of 10 cents per mile in serving "any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held."

Your question is whether the sheriff may charge 10 cents per mile when serving a summons or original writ when the service is accomplished more than five miles from the place where the court is held.

The statutory provision allowing mileage is couched in broad terms and includes the general language "any . . . writ" and "or other order of the court." You will note that in addition to the "original writ" for which the \$5.00 fee is provided, the statute provides a fee for a "writ of scire facias," a "writ or order of injunction" and a "writ of ad quod damnum." Thus, if mileage is not allowed when serving an original writ, it follows that it should not be allowed when serving the other writs specifically mentioned. However, we believe that the broad term "any . . . writ" was intended to include the various specific writs previously mentioned. Similarly, a summons, although not specifically provided for in the mileage provision, is an "order of the court."

Thus, it is our opinion that the general terms for the service of which mileage is allowed includes within its scope the service of a summons or original writ.

Based on the above, we are of the opinion that the sheriff may charge a fee for serving every summons or original writ and, in addition thereto, he may charge 10 cents per mile for every mile actually traveled in serving a summons or original writ when served more than five miles from the place where the court is held.

By its terms House Bill No. 169 adopted by the 75th General Assembly does not govern the fees to be collected by constables. Section 63.140, RSMo 1959, provides the fees to be allowed constables in class one counties.

Honorable Robert H. Branom
Honorable Kenneth J. Rothman

Section 63.140, RSMo 1959:

"Constables shall be allowed fees for their
services as follows:

"For serving a summons, rule, notice
or order of a magistrate in any
case \$.60

* * * * *

"For each mile actually traveled in
serving any process.10
* * *"

In our opinion the statute quoted above clearly provides that
constables are to be allowed mileage in addition to the fee provided
for serving the papers enumerated in Section 63.140, RSMo 1959.

Yours very truly,

JOHN C. DANFORTH
Attorney General

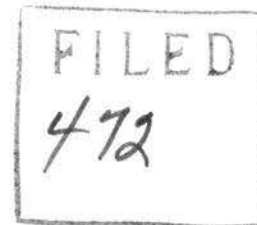
POOL TABLES:
LICENSES:

An operator of an amusement center is subject to the license fee provided in Chapter 318, RSMo 1959, with respect to a coin operated pool table used in the establishment, even though he is not the owner of the table.

November 4, 1969

OPINION NO. 472

Honorable Harold Dickson
Member of Missouri House of
Representatives-District 121
400 West Russell
California, Missouri 65018



Dear Mr. Dickson:

This official opinion is issued in response to your request for a ruling. The question raised is as follows:

"Is an operator of an amusement center subject to a tax on a pool table that is coin operated and is not owned by the owner of the establishment in which the table is used?"

Chapter 318, RSMo 1959, relates to the licensing of pool tables. Section 318.020 provides:

"The county court shall have power to license the keepers of billiard tables and all similar tables upon which balls or cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their county, as many blank licenses for the keepers of such tables herein mentioned as the respective courts shall direct which shall be signed by the clerk and attested by the seal of the court."

Section 318.020, in making provision for payment of a license fee, states:

"The collector shall deliver to any person who

Honorable Harold Dickson

shall have been licensed, a license to keep any such table mentioned in section 318.010 in their respective counties, for a term of twelve months, upon the payment by the applicant of the sum of twenty dollars for each billiard table, and ten dollars for each other table described in said section, and the collector shall countersign such license before delivering the same to the applicant; provided, that if the applicant be the keeper of more than one of such tables, the number may be named in one license, and in such case the clerk shall not be entitled to more than one fee as provided in section 318.050."

In a prior opinion issued by this office, i. e., Attorney General Opinion No. 324, July 25, 1967, Porter, a copy of which is enclosed herewith, it was determined that the license and license fee provisions of Sections 318.010 and 318.020, RSMo 1959, apply to coin operated pool tables and this conclusion is reaffirmed as the official opinion of this office.

The remaining question raised by your request is whether the operator of an amusement center in which a coin operated pool table is located, is a keeper of such table within the meaning of Chapter 318 even though he is not the owner of the device.

We have found no Missouri court decision which defines the meaning of the word "keepers" as used in Chapter 318. However, it is a basic rule of statutory construction that the intention of the legislature is to be ascertained from the words used ascribing to them their plain and rational meaning. *Gas Service Co. v. Morris*, 353 S.W.2d 645 (S.Ct.Mo.1962). As defined by Ballentine's Law Dictionary, Third Edition, a "keeper" is:

"One who has the care, custody, or supervision of anything; * * * one in possession of a thing, place, or business, whether or not the owner or proprietor. *Schultz v. State*, 32 Ohio St. 276, 281."

Black's Law Dictionary, Revised Fourth Edition, contains the following definition:

"A custodian, manager, or superintendent, one who has the care, custody, or management of any thing or place; one who has or holds possession of anything. *Schultz v. State*, 32 Ohio St.281; (other citations)."

Thus, it will be seen that according to the generally accepted definition of the term, a keeper need not be the owner of the thing kept. It is apparent that the operator of an amusement center has

Honorable Harold Dickson

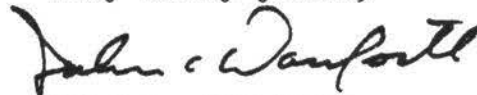
care, custody and superintendence over a pool table located and used on the premises and therefore he is its keeper.

CONCLUSION

Therefore, it is the opinion of this office that an operator of an amusement center is subject to the license fee provided in Chapter 318, RSMo 1959, with respect to a coin operated pool table used in the establishment, even though he is not the owner of the table.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

encls:

OP.325-67-Porter.

COUNTIES:

COUNTY PLANNING & ZONING:

1. Section 64.900, RSMo 1967 Supp., does not authorize the voters of Jefferson County to terminate county

planning and zoning adopted pursuant to the authority of Sections 64.510 through 64.690, RSMo 1959, as amended.

2. There is no constitutional or statutory authority for conducting a referendum on whether Jefferson County shall continue with planning and zoning unless the voters of Jefferson County, pursuant to Section 64.905, RSMo 1967 Supp., adopt county planning or zoning under the provisions of Sections 64.800 to 64.905, RSMo 1967 Supp., thereby bringing the county within the coverage of Section 64.900, RSMo 1967 Supp.

OPINION NO. 478

December 11, 1969

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
Hillsboro, Missouri 63050



Dear Mr. Weier:

This letter is in response to your request for an official opinion of this office on the following question:

"Jefferson County is a second class county and in 1962 enacted planning and zoning under the provisions of Sections 64.510 through 64.690. Subsequent to this enactment, to wit: in 1965, Sections 64.800 through 64.950 were enacted as an alternate plan for counties of second class.

"Under the alternate plan above and particularly 64.900, there is a provision for termination of planning and zoning by a petition and vote. There is no such provision under Sections 64.510 through 64.690. We request your opinion as to whether Section 64.900 applies to the first plan which would thereby permit a petition and a vote to vote out planning and zoning in Jefferson County. If you do not find that this section would apply to the planning and zoning in Jefferson County we would like to know your opinion as to any other common law or statutory means by which a referendum on the question could be had."

Honorable G. William Weier

We interpret this question to include two questions:

I. Does Section 64.900, RSMo 1967 Supp., apply to a county planning and zoning adopted pursuant to Sections 64.510 through 64.690, RSMo 1959?

II. If not, is there any other means by which a referendum on the question of whether to continue with planning and zoning in Jefferson County can be submitted to a vote of the people?

I.

As you point out in your opinion request, there is no provision under Sections 64.510 through 64.690, RSMo 1959, as amended, for a county to discontinue planning and zoning once it has been instituted pursuant to the provisions of those sections. In Opinion No. 234 of this office dated August 19, 1964, and addressed to the Honorable William W. Hoertel, we held that there was no statutory authority for submitting to the voters a proposition to discontinue planning and zoning and, in the absence of such authority, no election could be held by any second or third class county. A copy of Opinion No. 234 is enclosed herewith.

In 1965, as part of an alternative county planning and zoning procedure, Section 64.900 was enacted. Section 64.900, RSMo 1967 Supp., reads in its entirety as follows:

"1. Upon receipt of a petition signed by a number of eligible voters resident in the county equal to five per cent of the total vote cast in the county at the next preceding election for governor requesting an election on the question, the county court in any county which has adopted a program of county planning, county zoning or county planning and zoning shall, at a special election called for the purpose or at the next general election, submit to the voters of the county the proposition to terminate the program. The county clerk shall prepare the ballot in substantially the following form:

For the termination of (county planning, county zoning or county planning and zoning)

For the continuation of (county planning, county zoning or county planning and zoning). . . .

Honorable G. William Weier

"2. If a majority of those voting on the question vote for the termination of the program, the county court shall declare the program terminated and shall discharge any commission appointed thereunder. Any resolution, ordinance or regulation adopted under the program pursuant to the provisions of sections 64.800 to 64.905 shall be void and of no effect from and after the termination of the program as provided in this section."

In determining if this section applies to Jefferson County's planning and zoning adopted pursuant to Sections 64.510 through 64.690, it is important to note that Section 64.905 enacted in 1965 at the same time Section 64.900 was enacted clearly establishes that the provisions of Sections 64.800 to 64.905, RSMo 1967 Supp., are alternative to Sections 64.510 to 64.690, RSMo 1959, as amended.

Subparagraph 1 of Section 64.905 reads as follows:

"1. The provisions of sections 64.800 to 64.905 are established as an alternative to the provisions of sections 64.510 to 64.690."

Furthermore, the last sentence of Section 64.900 states that it pertains only to the alternative plan contained in Sections 64.800 through 64.905.

"... Any resolution, ordinance or regulation adopted under the program pursuant to the provisions of sections 64.800 to 64.905 shall be void and of no effect from and after the termination of the program as provided in this section."
[Emphasis supplied]

Therefore, we conclude that Section 64.900, RSMo 1967 Supp., does not apply to planning and zoning as adopted by Jefferson County pursuant to Sections 64.510 through 64.690, RSMo 1959, as amended.

II.

In response to your request for our opinion as to any other common law or statutory means by which a referendum on Jefferson County's planning and zoning could be had, we are not aware of any direct authority granted by the legislature to a county to conduct a referendum on an issue of this type. Article III, Sections 49 and 52(a) of the Missouri Constitution pertain only to referendum on acts of the General Assembly. We were unable to find any constitutional or statutory provision providing for referendums to rescind action taken by a county pursuant to a valid state statute.

Honorable G. William Weier

Although no general referendum procedure is available, we call your attention to the second paragraph of Section 64.905, RSMo 1967 Supp., which reads as follows:

"2. If the voters of any second or third class county adopt county planning or zoning under the provisions of sections 64.800 to 64.905 after having previously adopted county planning or zoning under the provisions of sections 64.510 to 64.690, the provisions of sections 64.800 to 64.905 shall be effective in the county and the county planning or zoning shall be conducted thereafter as provided in sections 64.800 to 64.905 rather than as provided in sections 64.510 to 64.690."

Although it would be a circuitous route to reach the objective, we point out that pursuant to this subparagraph the voters of Jefferson County could adopt county planning or zoning under the provisions of Sections 64.800 to 64.905, RSMo 1967 Supp., even though Jefferson County is already operating under planning and zoning pursuant to Sections 64.510 through 64.690, RSMo 1959, as amended. If this were done, county planning or zoning would be conducted thereafter as provided in Sections 64.800 to 64.905 thereby permitting the voters of Jefferson County to terminate county planning and zoning pursuant to the terms of Section 64.900.

CONCLUSION

Therefore, it is the opinion of this office that:

1. Section 64.900, RSMo 1967 Supp., does not authorize the voters of Jefferson County to terminate county planning and zoning adopted pursuant to the authority of Sections 64.510 through 64.690, RSMo 1959, as amended.
2. There is no constitutional or statutory authority for conducting a referendum on whether Jefferson County shall continue with planning and zoning unless the voters of Jefferson County, pursuant to Section 64.905, RSMo 1967 Supp., adopt county planning or zoning under the provisions of Sections 64.800 to 64.905, RSMo 1967 Supp., thereby bringing the county within the coverage of Section 64.900, RSMo 1967 Supp.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

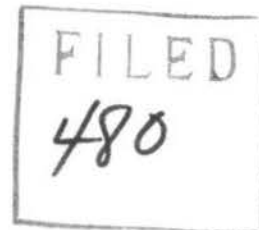
Enclosure: Op. No. 234
8-19-64, Hoertel

ANSWER BY LETTER: RUGER

December 19, 1969

OPINION LETTER NO. 480

Honorable A. Basey Vanlandingham
State Senator
19th District
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This opinion is in response to your request seeking valuation guidelines for school buildings and school personal property to be used in the apportionment of property pursuant to Section 162.031, RSMo Supp. 1967, resulting from the annexation by the City of Columbia of adjacent school property belonging to other districts.

The information required to accurately value the annexed districts' property should be readily available, thus eliminating a need for extensive revaluation. Section 162.301, RSMo Supp. 1967, a statutory provision enumerating the duties of officers of six director school districts, provides, in part, that:

"4. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the boards of common school districts."

Section 162.821, RSMo Supp. 1967, stating some of the duties of the district clerk of a common school district, provides, in part, that:

Honorable A. Basey Vanlandingham

"He shall transmit to the county superintendent, on or before the fifteenth day of July in each year, a report embracing the following items:

* * * * *

(6) Estimated value of school property owned and managed by the district; . . ."

Thus, regardless of the form of school district organization extant, a value must be reported annually for the districts' buildings and personal property.

Thus, according to these statutory provisions, records should be available to the districts from which the land was annexed and the annexing district indicating the 1969 valuation placed upon the property owned and managed by the school districts containing the annexed lands. Such valuation, when reported, should reflect the actual value of the school districts' property. The valuation should be determined by some recognized appraisal method which determines actual value of the property. For settlement purposes, the value of school property reported pursuant to Section 162.821, RSMo Supp. 1967, should be adjusted by whatever means of valuation are employed by the district or by an accepted method of valuation in order to represent its true current worth. There is no statutory requirement that a particular method of valuation be used. The resulting figure, representing the value of the property at the time of annexation, should then be used for apportionment purposes.

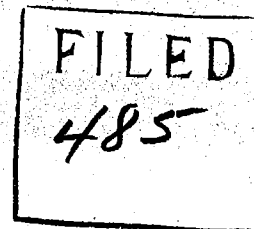
Very truly yours,

JOHN C. DANFORTH
Attorney General

November 3, 1969

OPINION LETTER NO. 485
(Answered by letter-Nowotny)

Honorable James L. Paul
Prosecuting Attorney
McDonald County Court House
Pineville, Missouri 64586



Dear Mr. Paul:

This is in answer to your request for an opinion of this office, which request reads as follows:

"Would you please advise me whether or not the 'minibikes' come under the purview of motor vehicles, which require licensing the same as other vehicles described in that section pertaining to licensing of vehicles."

Section 301.020, RSMo 1959, requires every owner of a motor vehicle which shall be operated or driven upon the highways of Missouri to register or license such motor vehicle with the Director of Revenue of Missouri.

Motor vehicle is defined in Section 301.010(15), RSMo 1969, as follows:

"'Motor vehicle', any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;"

Section 301.010(13) defines motorcycle as follows:

"'Motorcycle', a motor vehicle operated on two wheels;"

Our understanding of a "minibike" is that it is a miniaturized

Honorable James L. Paul

motorcycle, with limited horsepower, that is designed and advertised for trail or back-country riding, but that can also be used around town and certainly can be operated on the streets and highways of Missouri.

Enclosed is a copy of Attorney General Opinion No. 38, 1962, Bryan, which held that a motor-power-assisted bicycle is a motor vehicle within the meaning of Section 301.010, RSMo 1959. The opinion and the discussion and citations cited therein apply here.

Accordingly, it is our opinion that a "minibike" is a motor vehicle within the meaning of Section 301.010, RSMo 1959. Therefore, when a "minibike" is operated or driven on the highways of Missouri a license is required pursuant to Section 301.020, RSMo 1959.

Very truly yours,

JOHN C. DANFORTH
Attorney General

encls:

OP.38-62-Bryan

CONSTITUTIONAL LAW:

(1) Senate Bill No. 241 of the 75th General Assembly is not unconstitutional in violation of Article I, Section 13, Missouri Constitution; and (2) Senate Bill No. 241 is not unconstitutional in violation of Article X, Section 10(a), Missouri Constitution.

December 31, 1969

OPINION NO. 487A

Honorable J. J. Schorgl
Representative, District 9
126 N. Quincy
Kansas City, Missouri 64123



Dear Mr. Schorgl:

This is in reply to your request for an official opinion of this office which request reads as follows:

"I would also appreciate receiving your opinion as to whether Senate Bill 241 is constitutional or if it is in violation of Article I, Section 13, or Article X, Section 10A of the Missouri Constitution."

Senate Bill No. 241 amends Section 210.320, RSMo, and now reads as follows:

"Section 1. Section 210.320, RSMo 1959, is repealed and one new section enacted in lieu thereof to be known as 210.320, to read as follows:

"210.320. The county court in any such county, or the circuit court en banc in any first class county with all or part of a city of 350,000 or more population, shall make all rules and regulations for the government of such places of detention, appoint officers and attendants, including teachers, prescribe their duties and fix their compensation. The expense of maintaining such places of detention, including the compensation of officers and employees thereof, shall be paid out of any funds available for the purpose, as said county court may deem proper; provided, no portion of the special road fund shall be appropriated for this purpose.

Honorable J. J. Schorgl

"In any first class county with all or the greater part of a city of 350,000 or greater, to help defray the expenses of such places of detention and other children's services and for no other purposes, the county court or other legislative authority is hereby authorized to impose a tax on the sale of cigarettes made of tobacco or any substitute for tobacco, not to exceed two and one-half mills per cigarette sold in said county.

"The rate of taxation shall not be greater than the amount required for children's services.

"The county cigarette tax shall be collected by the division of collection of the state department of revenue. The division shall each day retain, from the county tax collected, one per cent of the amount collected and deposit that amount in the state general revenue fund to help defray the cost to the state of collecting and distributing this tax.

"The tax shall be paid and stamps affixed in the same manner as is provided by chapter 149 RSMo, for the state cigarette tax; except that no discount shall be given any wholesaler for affixing stamps or making reports required by the division.

"The director of revenue of this state shall promulgate reasonable and necessary regulations for the collection of this tax and any violation of such regulation is a misdemeanor and any person convicted of such a misdemeanor shall be punished by law.

"The budget for the operation of such places of detention shall be fixed by the Circuit Court en banc in counties of the first class with all or part of a city of 350,000, or more, population. Such budget shall be filed with the County Court at the same time as, and becomes a part of, the budget of the Circuit Court en banc for the performance of its other duties and functions."

You first ask if this law violates the provisions of Article I, Section 13, Missouri Constitution, which reads as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be enacted."

Honorable J. J. Schorgl

The term "ex post facto" has reference to crimes and their punishment and the term "retrospective" refers exclusively to laws relating to civil rights and remedies. Ex parte Bethurum, 66 Mo.545.

The term "ex post facto" means a law denouncing as crimes, acts which were innocent when committed or changing penalties for criminal violations after such violations. State ex rel. Jones v. Nolte, Mo., 165 S.W.2d 632.

A "retrospective" law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. Lucas v. Murphy, 348 Mo. 1078, 156 S.W.2d 686.

The provision prohibiting the enactment of any law impairing the obligation of contracts means that where a contract, that when made, is valid by the laws of the state as then expounded by the departments of government and administered in its courts of justice, then its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the legislature or decision of its courts altering the construction of the law. State v. Miller, 50 Mo.129.

After carefully examining Senate Bill No. 241 it is our opinion that said act is not unconstitutional in violation of Article I, Section 13, Missouri Constitution.

You next ask if Senate Bill No. 241 violates the provisions of Article X, Section 10(a), Missouri Constitution, which reads as follows:

"Except as provided in this Constitution, the general assembly shall not impose taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes."

In Kansas City Grading Co. v. Holden, 107 Mo.305, 17 S.W. 798,799, it was said:

"The right to levy taxes, either general or special, is vested primarily in the legislature. The power to raise local taxes for municipal purposes may be, and generally is, delegated to and exercised by the legislative body of the municipality. * * * "

It is our opinion that Senate Bill No. 241 delegates the power to tax by the language, "the county court or other legislative authority is hereby authorized to impose a tax" and that such language does not constitute a tax imposed by the legislature. See Coleman v. Kansas City, 353 Mo.150, 182 S.W.2d 74.

Therefore, it is the opinion of this office that Senate Bill No. 241 does not violate the provisions of Article X, Section 10(a), Missouri Constitution.

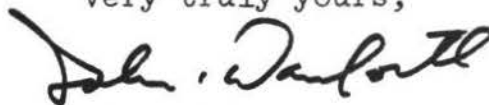
Honorable J. J. Schorgl

CONCLUSION

It is the opinion of this office that Senate Bill No. 241 of the 75th General Assembly, which provides for places of detention in certain counties and for a county cigarette tax to operate such places of detention: (1) is not unconstitutional in violation of Article I, Section 13, Missouri Constitution; and (2) is not unconstitutional in violation of Article X, Section 10(a), Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is written in a cursive, flowing style with a large initial "J".

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:

LICENSES:

The Department of Revenue has the right, and duty to collect the fees for motor vehicle registration as provided in Senate Bill No. 242, 75th General Assembly. The Department of Revenue must

collect these fees regardless of whether one or two license plates are provided pursuant to Senate Bill No. 242. While the Department of Revenue must collect the increased fees provided for in Senate Bill No. 242, the Department of Revenue need not provide two license plates until January 1, 1971.

November 25, 1969

OPINION NO. 488

Honorable R. J. King, Jr.
State Representative
39th District, St. Louis County
816 South Hanley Road
Clayton, Missouri 63105



Dear Mr. King:

This is in response to your request for an opinion on whether the Department of Revenue can collect the increased license registration fee, pursuant to Senate Bill No. 242, 75th General Assembly, prior to the time that dual license plates will be issued (sometime before January 1, 1971). Senate Bill No. 242, 75th General Assembly, (now Sections 301.020, 301.055, 301.057, 301.059, 301.060, 301.061, 301.063, 301.065, 301.067, 301.069, 301.080, 301.110, 301.130, 301.137, 301.150, Laws 1969, p. _____, Mo.Leg.Serv. p. 432), provides a schedule in Sections 301.055 to 301.069 for the registration fees for various types of motor vehicles in the State of Missouri. Uniformly, each of these fees is exactly fifty cents higher than the former fees for the same types of vehicles found in Section 301.060, RSMo 1959, (repealed by Senate Bill No. 242). Section 301.130, sub-section 2, Laws 1969, p. _____, Mo.Leg.Serv. p. 432, provides that the Director of Revenue shall mail two license plates to each applicant. Section 301.130, sub-section 6, Laws 1969, p. _____, Mo.Leg.Serv. p. 432, requires that every vehicle shall display, on the front and back, the license plates issued to them by the Department of Revenue. Section 301.150, sub-section 3, sub-section A, Laws 1969, p. _____, Mo.Leg.Serv. p. 432, provides:

Honorable R. J. King, Jr.

"The Department of Revenue shall issue license plates as provided under this act no later than January 1, 1971."

The sub-section A, cited above, states expressly that it applies to the issuance of license plates; it does not mention registration fees. The sections of Senate Bill No. 242 that provide for license fees contain no enactment similar to sub-section A, supra, nor any provisions stating that the registration fees shall not go into effect until two license plates are issued. Read on their face, the provisions increasing all of the registration fees by fifty cents merely do just that, and there is no contingency or purpose written into the law that the only reason they are being increased is to provide for the extra license that is to be issued prior to January 1, 1971. If it had been the legislature's intention to provide that the extra fifty cent increase in license fees was solely for the purpose of paying for the extra license plate now required, the legislature would have put such a provision into the law. As the law stands on its face, it is merely an increase in the license fees required to be paid to register a motor vehicle, and the law does not state that the increased fees are to pay for the extra license plate.

Section 1.130, RSMo 1959, provides that all laws passed by the General Assembly shall become effective ninety days after the adjournment of the session at which the laws were enacted, but if the law specifically contains an "emergency" provision in the body or the preamble of the act, or if it is an appropriation bill for the current expenses of the state government, for the maintenance of state institutions, or support of public schools, then the law takes effect at the hour and minute of its approval by the Governor. In some cases, the legislature can also provide that the law shall also take effect subsequent to ninety days after the adjournment of the session at which it is enacted. Senate Bill No. 242 contains no such emergency or appropriation provisions. Therefore, it takes effect pursuant to Section 1.130, RSMo 1959, cited above. The 75th General Assembly adjourned at midnight July 15, 1969, therefore, Senate Bill No. 242, having been approved by the Governor, became effective October 13, 1969. There were no provisions whatsoever calling for a different time for the fee provisions of Senate Bill No. 242 to take effect. Therefore, not only does the Department of Revenue have the power to collect the increased fees pursuant to Senate Bill No. 242, the department has the duty to collect the fees as those fees are, at this time, the fees that are currently in force for the registration of motor vehicles. The law (Senate Bill No. 242) in no way connects the registration fees to the number of license plates issued. Although the section of the law requiring the Director of Revenue to issue two license plates is also currently

Honorable R. J. King, Jr.

in force, the legislature provided, in the law itself, that the Director of Revenue need not follow those specific provisions until January 1, 1971. No such clause is present, however, relating to increased registration fees.

CONCLUSION

Therefore, it is the conclusion of this office that the Department of Revenue has the right, and duty to collect the fees for motor vehicle registration as provided in Senate Bill No. 242, 75th General Assembly. The Department of Revenue must collect these fees regardless of whether one or two license plates are provided pursuant to Senate Bill No. 242. While the Department of Revenue must collect the increased fees provided for in Senate Bill No. 242, the Department of Revenue need not provide two license plates until January 1, 1971.

The above opinion, in which I concur, was prepared for me by my assistant, Thomas L. Patten.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Answer by Letter (Burns)

October 31, 1969

OPINION LETTER NO. 498

Honorable Kenneth Rothman
State Representative
District No. 36
130 South Bemiston Avenue
Clayton, Missouri 63105



Dear Mr. Rothman:

This is in answer to your letter of recent date in which you asked as to the legal sufficiency of a form of initiative petition for a constitutional amendment which you submitted to this office.

The initiative petition purports to repeal Section 2 of Article VIII, of the Constitution of Missouri relating to qualifications of voters and to adopt a new section in lieu thereof. The change in the constitutional section makes the legal age for voting eighteen instead of twenty-one.

It is our view that the initiative petition which you have submitted does comply with the constitutional and statutory requirements for such petitions and would, if signed by the requisite number of electors, authorize and require the Secretary of State to submit such proposed amendment at the next general election if the initiative petition is submitted within the proper statutory time.

We do, however, have several suggestions with regard to the petition. We believe that the statutory provisions of Section 126.030 contemplate that the proposed amendment shall be set out as part of the initiative petition rather than being attached to the petition as such.

In the case of *State v. Burns*, 172 S.W.2d 259, a petition was approved when the petition was placed on the back and front side of a single sheet. The petition proper and thirty-two of

Honorable Kenneth Rothman

the signatures were on the front side and eighteen signatures, the affidavit and the proposed measure were on the back side. The court upheld the validity of such initiative petition because the court held that the suggested statutory form was not mandatory, but required only substantial compliance with its requirements. However, the court did state that the apparent intent of the statute is that the proposed measure will appear on one sheet of the initiative petition and the signatures and affidavit on another so that the admonition of such statute can be followed and the sheets containing the measure itself can be discarded and the Secretary of State shall retain only the signatures of the petitioners and the affidavit attesting the signatures of the petitioners.

For this reason, we believe it would be preferable, instead of referring to the "attached" proposed amendment, to use statutory language found in Section 126.030, and the reference should be made to the "following" proposed amendment. We believe that it would be preferable in making out the petition to provide that the statutory language of Section 126.030 be followed down to the provision "3rd day of November, A.D. 1970" and add after such provision "to wit" and then to insert at that point the proposed constitutional amendment and on such page, also, after the text of the proposed amendment, to continue with the rest of the statutory provision beginning "and each."

We suggest in view of the ruling in the Burns case, that there could be a separate sheet for the signature of the persons signing the petition and the verification, and a column, as is provided in your petition, for residence and post office. As the court pointed out in the Burns case, the entire petition including signatures and verification can be on the front and back of one sheet. However, it would appear that the number of signatures that could be affixed and verified if the text were included in the petition would be more limited than if a complete sheet were provided for signatures and verification.

We suggest, also, for the benefit of the circulators of the petition and of those wishing to sign the petition, that there be inserted in parentheses under the heading of "residence" the following: "if in a city, give street and house number." Under the heading "post office" we suggest there should be inserted in parentheses: "Mailing address including city."

In the case of Sayman v. Becker, 269 S.W. 973, the Supreme Court held that the city, street and house number did not have to appear in the columns under both the headings of "residence" and "post office." However, we believe that it might be wise

Honorable Kenneth Rothman

to include in the petition form the references above so that the street and house number shall appear under the heading "residence" and if the post office is different from the town in which the residence is located, that such should appear under the heading "post office." In any event, the town and state should also be listed under the heading "post office."

The affidavit of the circulator, of course, can be on the reverse side of the sheet containing the signatures of the persons who signed the petition. In any event, whether the petition is finally made out as you have submitted, or as we have suggested, there will be two sheets, one containing the proposed measure and the other containing the signatures of those signing the petition and the affidavit of the circulators.

As stated above, it is our view that it would be preferable to have the measure set out in the petition, and the signatures of the individuals signing the petition and the affidavit of the circulator on a separate sheet. In this way there can be no doubt as to the fact that those signing the petition will have been fully informed as to the provisions of the proposed amendment because it is contained on the first sheet containing the request for the Secretary of State to submit the constitutional amendment and not on a second attached sheet.

We believe that the court will be liberal in upholding the right of the people to submit an amendment by the initiative, but we believe that it would be preferable to include the title and text of the proposed amendment in the petition itself, as this would, we believe, discourage any attack on the sufficiency of the petition as to form.

The initiative petition submitting a statute authorizing branch banking voted on November 4, 1958, contained the text of the proposed act in the petition itself and not as an attachment, and we believe, such form of petition to be in compliance with the legal requirements.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Gardner

December 9, 1969

OPINION LETTER NO. 499

Mrs. Olean Barton, Secretary-Treasurer
Missouri Board for Architects,
Professional Engineers and Land Surveyors
Post Office Box 184
Jefferson City, Missouri 65101



Dear Mrs. Barton:

This is in response to your request for an official opinion of the question whether citizenship is a requirement for registration as an architect, a professional engineer or a land surveyor under Senate Bill 117 of the 75th General Assembly.

In Opinion No. 124, answered by letter to you, March 1, 1965, this office advised that under Section 327.030, RSMo 1959, one must be a citizen of the United States (or Puerto Rico) before original registration may be granted by the board. However, since that time Chapter 327, which included Section 327.030, was repealed by the enactment of Senate Bill 117. By this bill, the General Assembly enacted a completely new Chapter 327, but the new chapter does not include a provision which requires a person to be a citizen before original registration may be granted by the board. On the other hand, with respect to persons who have been registered in another jurisdiction, the bill provides in Section 327.381 as follows:

"The board may in its discretion issue a certificate of registration to any architect or professional engineer or land surveyor who has been registered in another state, territory or possession of the United States, or in another country, provided that the board is satisfied by proof adduced by such applicant that his qualifications for registration are at least equivalent to the requirements for initial registration in Missouri at the time of applicant's initial registration"

Mrs. Olean Barton

Accordingly, it is the opinion of this office that citizenship is not a requirement for registration as an architect, a professional engineer or a land surveyor under any section of Senate Bill 117 of the 75th General Assembly.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 124
3-1-65, Barton

SCHOOLS:
INSURANCE:

A school board has the discretionary authority to pay the premiums for life insurance for its employees as part of their compensation.

OPINION NO. 500

November 18, 1969



Honorable A. Basey Vanlandingham
Representative - 19th District
12 North Second Street
Columbia, Missouri 65201

Dear Representative Vanlandingham:

This letter is in response to your request for an opinion of this office in which you ask whether school boards can purchase life insurance for their employees as part of the employees' compensation.

As you note, this office has previously, by Opinion No. 93, Cason, 9/9/69, held that a school board has the authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district as a form of compensation. We see no valid distinction between the purchase of liability insurance as compensation and the purchase of life insurance as compensation.

CONCLUSION

It is the opinion of this office that a school board has the discretionary authority to pay the premiums for life insurance for its employees as part of their compensation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kenneth M. Romines.

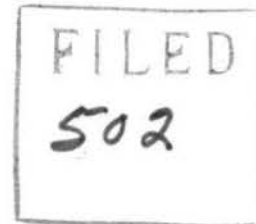
Yours very truly,

JOHN C. DANFORTH
Attorney General

November 14, 1969

OPINION LETTER NO. 502

Honorable Frank Bild
State Representative
47th District
7 Mappen Court
St. Louis, Missouri 63128



Dear Mr. Bild:

This letter is in answer to your request for an opinion concerning whether or not the municipal ordinance providing for the employment of a special counsel must designate the counsel to be so employed and set out the terms of employment or whether such ordinance is sufficient if it merely authorizes the employment of special counsel, the particular individual to be designated at a later time by motion or resolution of the Board of Aldermen.

Your question is in reference to fourth class cities and the statute with respect to special counsel is Section 79.230, RSMo 1959, which provides in full as follows:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner."
(Emphasis added)

Honorable Frank Bild

We note that in the case of Dearmont v. Mound City, 278 S.W. 802, the Kansas City Court of Appeals held that special counsel could not be employed by motion or resolution.

It is our view that the ordinance must designate the person to be employed, set out the compensation and other terms of employment, and that an ordinance merely authorizing the employment of special counsel would not be in compliance with Section 79.230.

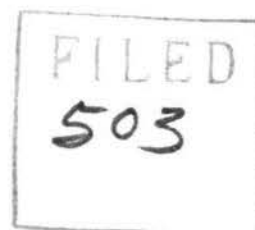
Very truly yours,

JOHN C. DANFORTH
Attorney General

November 20, 1969

OPINION LETTER NO. 503

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to Section 126.060, RSMo 1959, I have prepared a ballot title for the referendum on Senate Substitute for House Bill No. 480, Seventy-Fifth General Assembly. The ballot title is:

"Provides for increase in State employees' retirement benefits; further provides that legislators and elected State executive officers shall be members of a separate retirement system to be known as the legislators' retirement system; provides that members of the legislators' retirement system shall contribute to such system and receive benefits from such system; provides that the State shall contribute annually to the legislators' retirement system an amount sufficient to cover the amount by which benefits paid to members of such system exceed contributions of members to such system."

Yours very truly,

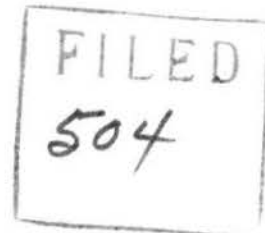
JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

November 5, 1969

OPINION LETTER NO. 504

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in response to your request for an opinion concerning the problem of bond registration with respect to school bonds in the amount of \$200,000 bearing 6 1/4 percent interest and issued by Reorganized School District R-10 of Lafayette and Saline Counties, Missouri, dated November 1, 1969, said bonds having been presented to your office for registration. It is our understanding based on further inquiry that these bonds had been sold at private sale. Specifically, you asked whether these bonds are eligible for registration at this time and whether they should be registered by your office.

In response to your request, we are sending the following enclosed opinions: Opinion No. 436 issued to the Honorable Haskell Holman on October 9, 1969, and Opinion No. 454 issued to the Honorable William C. Phelps on November 4, 1969. It is our feeling that these opinions cover the questions raised.

House Bill No. 2 as passed by the First Extraordinary Session of the 75th General Assembly and signed by the Governor on October 10, 1969, provides that all bonds issued after the effective date of this bill by any school district may not bear interest at a rate exceeding 6 percent with the exception that such bonds may bear interest at a rate not exceeding 8 percent if sold at public sale after giving reasonable notice of such sale. In Opinion No. 454 we held that the emergency clause in House Bill No. 2 was invalid. Therefore, it was our opinion that House Bill No. 2 does not become effective until 90 days after the adjournment of the General Assembly, i.e., December 29, 1969.

Honorable Haskell Holman

Since, in our opinion, House Bill No. 2 has not yet become effective, the validity of the bond issue presented for registration must be governed by prior law. In Opinion No. 436 we held that the highest rate of interest payable on general obligation school bonds issued by common, six-director, urban or metropolitan school districts in this state was 8 percent per annum.

Therefore, it is our opinion that school bonds in the amount of \$200,000 bearing 6 1/4 percent interest as issued by the Reorganized School District R-10 of Lafayette and Saline Counties before the effective date of House Bill No. 2 are eligible for registration in the Auditor's Office pursuant to Section 108.240, RSMo 1959, even though said bonds were sold at private sale.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 436
10-9-69, Holman

Op. No. 454
11-4-69, Phelps

USURY:
REAL ESTATE MORTGAGES:
FHA GUARANTEED LOANS:

(1) Consideration paid by buyer to lender for bona fide services is not interest. (2) Consideration by seller to lender to induce making of loan is not interest unless shown to be subterfuge to establish artificially high purchase price. (3) Mortgage insurance premiums collected by lender and paid to FHA do not constitute interest. (4) Section 362.195, RSMo 1959, purporting to exempt FHA guaranteed loans from usury laws is unconstitutional.

OPINION NO. 506

December 18, 1969



Honorable Edward E. Ottinger
Representative - 60th District
5912 Loughborough
St. Louis, Missouri 63109

Dear Mr. Ottinger:

This official opinion is issued pursuant to your telegraphic request in which you ask questions about the application of the Missouri usury statutes to certain payments which are made in connection with mortgage loan transactions involving loans guaranteed by the Federal Housing Administration. We understand that the payments you ask about are as follows:

(a) A payment by a buyer-borrower to a lender of a percentage of the face amount of the loan, one time and not annually, as a "service fee." The current rate is apparently one percent of the principal amount of the loan (one point).

(b) A payment by the seller to the lender of a percentage of the face amount of the loan, ostensibly as additional consideration in order to induce the lender to consummate the loan transaction with the buyer. The current rate for these payments appears to be eight percent of the face amount of the loan (eight points).

(c) We also understand that borrowers pay an additional sum of one half of one percent of the principal of the loan per annum as a mortgage insurance premium. The borrower pays the premium as a part of his regular monthly payments. The insurance payments

Honorable Edward E. Ottinger

are used to create a fund from which lenders who suffer loss through default and foreclosure are reimbursed. Under some circumstances a portion of the premium is refunded to the borrower on payment of the loan. We consider that it would be helpful to discuss the question whether these mortgage insurance premium payments constitute interest within the Missouri usury statutes.

We also understand that the current interest rate on FHA loans is the maximum allowed by FHA, and that this is seven and one-half percent.

Description of Typical Transaction

Our understanding of a typical transaction is that the lender does not come into the picture until the seller and the buyer have agreed upon a price.

The buyer will normally have to borrow a substantial portion of the purchase price. He may not be able to buy the house unless he can find either a seller who is willing to carry a large loan, or a lender who is willing to lend on the basis of a FHA or Veterans' Administration guarantee.

In order to obtain a guaranteed loan, there must be an independent appraisal which sets forth a maximum loan value. The buyer may not obtain a guaranteed loan for more than the appraised value. He could agree to pay more than the market value as indicated by the appraiser, provided that he could obtain the additional cash.

We are advised that the "prime" interest rate, which is the rate charged by major metropolitan banks to their most secure customers, is now eight and one-half percent. Corporations are not subject to the usury laws, and there are other transactions which do not involve interest. It would be assumed that a lender would place its money where the highest return could be obtained.

At the present time it is therefore necessary for the seller to make a payment to the lender to induce the lender to make a loan to the buyer at an interest rate authorized by the FHA. Such payment is usually described as a payment of a certain number of "points" each part being one percent of the loan. We construe your reference to an eight percent discount as referring to a payment of eight points to the lender by the seller.

If the face amount of a mortgage loan is \$20,000. the seller would pay \$1600. to the lender. At the closing of the transaction the buyer would pay the down payment and sign a \$20,000. note. The sum of these figures is the purchase price which he agreed to pay. He would also pay \$200 to the lender, that is one percent of the amount of the loan as a "service fee," and would receive a deed. The seller would receive a net of \$18,400. from the loan

transaction, and would also receive the down payment. We understand that it is the practice of lenders to disburse the full loan proceeds which in this case would be \$20,000. to the seller or his agent, and to receive a check back for the points.

The Usury Laws

Section 408.030, RSMo provides as follows:

"The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due on any contract."

(a) Payments by borrower (buyer)

It would appear that the payment of interest at the rate of seven and one-half percent per annum, plus a one percent "service fee," paid only one time, would not raise the rate of a long-term loan above the lawful rate of eight percent. For purposes of completeness, however, we will consider the question whether this service fee constitutes interest.

A payment by a borrower to a lender for services actually rendered is not invalid, and it does not necessarily constitute interest. *Cuendet v. Love, Bryan & Co.*, 57 S.W.2d 701 (St.L.Mo. App. 1933). Where the services are unsubstantial or illusory, however, then the additional payment will constitute interest. *Hecker v. Putney*, 196 S.W.2d 442 (St.L.Mo.App. 1946). If the services given in exchange for the one percent service fee are substantial, then the fee could be justified without partaking of the nature of interest.

Whether a particular payment constitutes interest or not is a question of fact. *Stewart v. Boone County Trust Co.*, 230 Mo.App. 120, 87 S.W.2d 223 (St.L.Ct.App. 1935).

The charge on FHA loans is provided for in Section 203.27, Vol. II, Regulations and Rulings, Federal Housing Administration which provide in part:

" (a) The mortgagee may collect from the mortgagor the following charges, fees or discounts:

* * *

" (2) A charge to compensate the mortgagee for expenses incurred in originating and closing the loan, the charge not to exceed:

" (1) \$20 or 1 percent of the original principal amount of the mortgage, whichever is the greater; . . ."

Under the precise facts presented, whether the services are substantial or not, the charging of this fee would not appear to violate the usury laws, since a one-time charge of one percent on a long-term loan bearing interest at the rate of seven and one-half percent per annum would not result in an over-all rate in excess of eight percent per annum.

(b) Payment by the seller to the lender

The payment of eight "points" by the seller to the lender is more substantial, in amount, and apparently would render the transaction usurious if it were considered to be a payment of interest by the buyer-borrower.

91 C.J.S., Usury, Section 47, page 630, reads as follows:

"Ordinarily, a bonus given or paid by a stranger to a contract of loan or forbearance, for his own purposes or reasons sufficient to himself, to induce the making of a contract by the lender, does not affect the contract with usury, . . . the purpose underlying usury statutes, which is the protection of debtors against hardship and oppression, . . . having no relevancy where the only loss or detriment is to a stranger. The rule is otherwise, however, where the person paying or promising to pay the bonus, while nominally a stranger to the transaction, is in fact the real beneficiary of the loan or forbearance, or where the debtor reimburses such person, or is in any way obligated to reimburse him, for the amount of such bonus, . . ."

The law looks to substance rather than to form in detecting usury. *General Motors Acceptance Corporation v. Weinrich*, 262 S.W. 425 (Mo.App. 1924); *Webster v. Sterling Finance Co.*, 195 S.W.2d 509 (Mo. 1946). The courts will not, however, rely on mere suspicion in order to find that a transaction is different from what it purports to be.

A seller may sell at one price for cash and at a different and higher price on time. *Wyatt v. Commercial Credit Corporation*, 341 S.W.2d 348 (K.C.Mo.App. 1960). This is the general law, applicable except where changed by specific statute.

If a seller of real estate takes the buyer's note for all or a part of the purchase price, he may sell the note to anyone who is willing to buy it for a price that the two agree upon. A discount under these circumstances is not interest. *Webster v. Sterling Finance Co.*, *supra*. The case would be different if there was no bona fide sale transaction, as in *Anderson v. Curls*, 309 S.W.2d 692 (K.C.Mo.App. 1958) where an intermediary obtained a

Honorable Edward E. Ottinger

\$400 note from a borrower, purportedly sold it to a knowing person for \$200, and remitted \$175 to the borrower. The court said that there was no sale, but simply a loan by the party paying the \$200.

A payment of a commission to a stranger for the obtaining of a loan through his efforts is not interest. *Fischman v. Schultz*, 55 S.W.2d 313 (St.L.Mo.App. 1932). The case would of course be different if the borrower paid the commission to a person who was not a true broker but simply an agent for the lender. *Hecker v. Putney*, supra.

We conclude from the foregoing that a seller of real estate could properly make a payment to a lender in order to induce that lender to make a loan to the buyer, without constituting the seller's payment interest paid by the buyer. The seller has a proper interest in the making of the loan which would support a consideration moving from him. The making of the loan is not necessarily a benefit to the buyer, who would be willing to have the seller as his lender. The transaction is not far removed from one in which the seller takes the buyer's note and then discounts it in a sale transaction to which the buyer is a stranger. There is no indication that the buyer is obliged to reimburse the seller, for the amount of the consideration paid by the seller to the lender. It is of no significance that the lender is acquiring a guaranteed loan. This simply means that the consideration asked is based on the money market, and not on any risk of noncollection.

The lender, concededly, receives more than an eight percent return on his money. This is not significant. One who lends to a corporation may receive more than eight percent, as may one who purchases negotiable paper owned by others. The purpose of the usury statutes is to protect debtors, *Coleman v. Cole*, 158 Mo. 253, 59 S.W. 106 (1900); *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S.W. 1006 (1904). The statutes do not exist to limit the return which lenders may obtain.

It might be possible to conceive of a transaction in which a seller and a buyer created a fictitious price in order to enable the buyer to negotiate a loan which was otherwise usurious. By the holding in *Webster v. Sterling Finance Co.*, supra, such a result would not be presumed and one asserting it would have to prove his case. The claim of a fictitious price is effectively rebutted in a case in which the buyer has agreed to a price, prior to the consummation of any lending transaction, and in which the buyer pays no more than the price he has previously agreed to, together with interest on the deferred payments. While wider availability of mortgage money might stimulate purchases and therefore tend to increase the purchase price, the effects are remote from a particular transaction and do not, in our opinion, convert "points" paid by the seller into interest attributable to the buyer.

Honorable Edward E. Ottinger

(c) Mortgage insurance premium

The mortgage insurance premium (presently one-half of one percent per annum) is collected by the lender or his assignee from the borrower, as a part of each month's payment, but is paid over to FHA for the purpose of creating a fund for the reimbursement of losses suffered by lenders. Only if there were a loss would this premium payment inure to the benefit of the lender, and then it would pay him no more than he would be entitled to receive if the borrower were fully to perform his obligations.

The Supreme Court of Tennessee considered the status of these mortgage insurance premiums in *Silver Homes, Inc. v. Marx & Bensdorf, Inc.*, 333 S.W.2d 810 (Tenn. 1960). That court held that the premium payments were not interest within the meaning of the usury statutes of the state, saying, 1.c. 813:

" . . . This insurance premium is solely an expense incident to the necessity of furnishing the lender satisfactory security for the repayment of the money loaned for the purpose.

* * *

" . . . Though it is money which the borrower pays, it is not money received for the use of the lender. So, it is not interest within the meaning of our usury statute. . . ."

Numerous cases hold that payments by the borrower to the lender for the purchase of fire and casualty insurance, required to be maintained by the terms of the mortgage or deed of trust, are not interest payments. See Annotation 91 A.L.R.2d 1344.

The Tennessee opinion appears to be soundly reasoned. We see no essential difference between that state's usury statutes and Missouri's. The Tennessee court points out that the insurance premium payments are solely for the purpose of improving the security, and that they do not provide a return to the lender over and above the basic interest rate. They are payable to a third party for a valid consideration moving from that party. The payments are similar to other payments which the borrower may be required to make in order to make his security acceptable, such as the fire and casualty premiums above mentioned, abstracting or surveying expense, and charges for title examination or title insurance policies.

We believe that the Missouri courts would follow the Tennessee opinion in holding that mortgage insurance premium payments to FHA are not interest.

Honorable Edward E. Ottinger

Statutory Exemptions

We have considered the statutes authorizing banking institutions, trust companies, loan and investment companies and mortgage loan companies to make loans secured by real property which the FHA insures.

Section 362.180, RSMo 1959, provides as follows:

"Banking institutions, trust companies, insurance companies, loan and investment companies and mortgage loan companies are authorized

(1) To make such loans and advances of credit and purchases of obligations representing loans and advances of credit as are eligible for insurance pursuant to title I, section 2 of the National Housing Act, and to obtain such insurance;

(2) To make such loans secured by real property or leasehold interests as the Federal Housing Administrator insures or makes a commitment to insure pursuant to Title II of the National Housing Act and to obtain such insurance."

Section 362.195, RSMo 1959, provides in part as follows:

"No law of this state . . . prescribing or limiting interest rates upon loans or advances of credit, . . . shall apply to loans, . . . made pursuant to Sections 362.180 . . ."

This statute on its face might permit the making of FHA insured loans without regard to state usury laws.

The statutory provisions present problems. There is first a problem of determining the institutions to which the laws apply. Chapter 362, RSMo applies to "banks," Chapter 363, RSMo to "trust companies," and Chapter 368, RSMo to "loan and investment companies." Repealed Chapter 366, RSMo applied to "mortgage loan companies," and was a part of the statutes at the time Sections 362.180 and 362.195 were enacted. The question is whether Section 362.180 is limited to the specific corporations organized under Chapters 362, 363, 368, and former Chapter 366, or whether the terms "loan and investment companies" and "mortgage loan companies" should be given a broader reading so as to extend to savings and loan associations and other corporations which deal in real estate loans.

Honorable Edward E. Ottinger

Since each of the entities listed in Section 362.180 is described in terms of a corporation organized under a specific statutory chapter which was in effect at the time of enactment of Section 362.180, we are of the opinion that the exemption established by that and the following sections would be available only to corporations organized under Chapters 362, 363, 368 and repealed Chapter 366 of the Missouri Revised Statutes, and that the exemption cannot be construed as applying to savings and loan associations organized under Chapter 369, or to corporate lenders organized under other incorporating statutes.

This view is borne out by the fact that there was an attempt to amend Section 369.345, RSMo, by House Bill No. 73 of the Seventy-Fifth General Assembly which provided that FHA loans made by savings and loan associations would be exempt from the usury laws. Such bill died in the Senate Committee on banks and financial institutions.

Article III, Section 44 of the Missouri Constitution provides as follows:

"No law shall be valid fixing rates of interest or return for the loan or use of money, . . . for any particular group or class engaged in lending money. The rates of interest fixed by law shall be applicable generally and to all lenders without regard to the type or classification of their business."

In the case of Household Finance Corporation v. Shaffner, 203 S.W.2d 734 (Mo.en Banc 1947) the Supreme Court of Missouri in discussing Section 44, Article III of the Constitution said, l.c. 738:

"Section 44 does not prohibit the enactment of laws authorizing the formation and regulation of different types of lenders, such as banks, savings and loan association, etc. Nor does it prohibit the enactment of laws providing reasonable clasification [sic] of loans as to amount, or otherwise, with different permissible rates of interest for different types of loans, but the rates provided for any type of loans, must be available to all lenders who make such loans, without regard to the type or classification of their business. Whether the constitutional provision is wise or unwise is not our province to decide."

Honorable Edward E. Ottinger

Since Section 362.195 does classify lenders by exempting from the usury laws only the corporations listed in Section 362.180 it is unconstitutional and void because it violates Section 44 of Article III of the Constitution. However, FHA loans as well as other loans on real estate in which the interest charged is not more than eight percent per annum do not violate the Missouri usury laws.

Truth in Lending

We consider that usury problems are governed by state law, and that any federal requirements as to disclosure of fees or charges do not affect the determination of what is interest and what is not.

CONCLUSION

It is the opinion of this office:

(1) That a payment by a borrower to a lender in return for services actually rendered does not constitute interest within the provisions of Section 408.030, RSMo 1959.

(2) If a buyer and a seller of real estate have agreed in good faith on a price and have not created a fictitious price, then a monetary consideration moving from a seller to a lender, which the lender demands as a condition of making a loan, is not interest attributable to the buyer within the meaning of Section 408.030, RSMo. Therefore payment of points (each point being one percent of the face amount of the loan) by the seller to the lender to induce the lender to make a loan does not constitute interest.

(3) A mortgage insurance premium, collected by the lender from the borrower but paid over to FHA, is not interest.

(4) Section 362.195, RSMo, which exempts FHA loans made by certain corporations from the Missouri usury laws is unconstitutional and void because it does not apply to all lenders and is therefore violative of Section 44 of Article III of the Missouri Constitution.

(5) FHA loans as well as other loans on real estate in which the interest charged is not more than eight percent per annum do not violate the Missouri usury laws.

Honorable Edward E. Ottinger

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in dark ink, reading "John C. Danforth". The signature is written in a cursive style with a large, prominent "J" and "D".

JOHN C. DANFORTH
Attorney General

Answered by Letter
Klaffenbach

November 14, 1969

OPINION LETTER NO. 508

Honorable Edna Eads
Representative
District No. 149
112 South Pine Street
Bonne Terre, Missouri 63628



Dear Mrs. Eads:

This letter is in response to your opinion request concerning Section 59.257 of House Bill No. 119 of the 75th General Assembly, which was effective October 13, 1969, asking whether the salaries of the deputies of the recorder of deeds of third class counties are to be paid from the general revenue of the county or from the recorder's fees.

Section 59.257, of course, concerns recorders of deeds in third class counties where there is a separate circuit clerk and recorder. The previous section with respect to the payment of deputies in such a county was Section 59.250, RSMo Supp. 1967. The repealed section stated in full as follows:

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 137.117, RSMo, and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of the fees and emoluments the amounts for deputies and assistants in his office that the county

court deems necessary.

"3. In addition to the fees allowed to be retained by subsection 2 he shall receive as compensation for the performance of the duties imposed by section 59.225 one thousand dollars per year to be paid out of the county treasury." (Emphasis added)

Obviously under the repealed section, the payment of the deputies was made from the recorder's fees.

Section 59.257 of House Bill No. 119 states in full as follows:

"The recorder of deeds in counties of the third class wherein there is a separate circuit clerk and recorder, is entitled to appoint the deputies that the recorder of deeds, with the approval of the county court, deems necessary for the prompt and proper discharge of the duties of his office. The deputies shall possess the qualifications of clerks of courts of record and may, in the name of their principal, perform the duties of the recorder of deeds, but all recorders of deeds and their sureties are responsible for the official conduct of their deputies. The deputies appointed as herein provided shall receive the salaries that are fixed by the recorder of deeds, with the approval of the county court, from the general revenue of the county. The appointment of every deputy shall be in writing, endorsed with an oath of office, similar to that taken by the recorder of deeds and subscribed to by the deputy appointed, and filed by the recorder with the county court." (Emphasis added)

It is clear that the above section provides that the deputies shall receive the salaries that are fixed by the recorder of deeds with the approval of the county court from the general revenue of the county.

The complication, of course, is created by the interpretation of the provisions of House Bill 119 with respect to the effective date of the provisions of that bill relating to the compensation of the recorder of deeds of such county. That is to say, on October 9, 1969, we issued our Opinion No. 399 to William S. Brandon. In that opinion, we concluded in part that the recorder of deeds in counties of the third class will not receive the compensation provided by House Bill No. 119 during his present term if the compensation of such officer provided by such bill is greater than the present statutory salary of such officer. Acting upon

Honorable Edna Eads

the assumption, therefore, that the recorder of the county in question in this opinion is not entitled to receive the compensation during the present term as set out in House Bill No. 119 pursuant to our Opinion No. 399, the question follows as to whether or not the deputies of such recorder are to receive their compensation under old Section 59.250 or new Section 59.257 of House Bill No. 119.

It is our view that Section 59.257 of House Bill No. 119 applies and is effective October 13, 1969, regardless of whether or not the provisions relating to the compensation of the recorder of such county are effective on that date or at the termination of said recorder's term of office.

Therefore, the salaries of said deputies as fixed by the recorder of deeds and approved by the county court are to be paid from the general revenue of the county.

Yours very truly,

JOHN C. DANFORTH
Attorney General

AGRICULTURE:
ADMINISTRATIVE HEARING
COMMISSIONER:

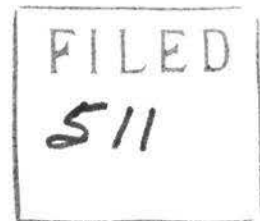
Hearings to organize Commodity Mer-
chandising Councils authorized by
Senate Bill No. 65, 75th General
Assembly, shall be conducted by the

person holding the office of Administrative Hearing Commissioner who
has been appointed by the Governor with the advice and consent of
the Senate pursuant to Section 161.252, RSMo Supp. 1967, and that
the Commissioner of Agriculture is empowered to make the determina-
tion from the record taken of the testimony received at the hearing.

OPINION NO. 511

December 2, 1969

Mr. Dexter D. Davis, Commissioner
Department of Agriculture
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Davis:

This is in response to your request for an official opinion
on the question whether hearings to organize Commodity Merchan-
dising Councils authorized by Senate Bill No. 65 of the 75th General
Assembly may be conducted by hearing officers designated by the
Commissioner of Agriculture or whether such hearings must be con-
ducted by the Administrative Hearing Commissioner appointed by the
Governor pursuant to Section 161.252, RSMo Supp. 1967.

Your question arises under the following provision of Section
4 of Senate Bill No. 65:

"Section 4. Every hearing held pursuant to this
act shall be public and a permanent record taken
of all testimony received. The administrative
hearing officer shall conduct the hearing and
the commissioner may make the determination from
the record."

The Commissioner referred to in the foregoing quotation is defined
in Section 1 paragraph 3 of the Act as ". . . the commissioner of
agriculture of the state of Missouri or his delegated representa-
tive;".

The basic rule of construction of a statute is to seek the in-
tention of the legislature as expressed in the statute. Julian v.
Mayor, Councilmen, and Citizens of the City of Liberty, 391 S.W.2d
864. The intention of the legislature in this instance is revealed
by the legislative history of the Act.

Mr. Dexter D. Davis

In the original Senate Bill No. 65 as introduced by Senators Tinnin and Ryan, we find that on page 4, section 4, lines 1 through 8 are as follows:

"Section 4. Every hearing held pursuant to this act shall be public and a permanent record taken of all testimony received. The commissioner may designate employees of the department of agriculture or other qualified persons, or both as examiners. The examiners may exercise any power herein conferred on the commissioner. At each hearing the commissioner shall receive evidence with respect to all of the matters and things on which he must make a finding."

In the Senate Journal for Monday, March 10, 1969, we find at the bottom of page 323 the following:

"Senator Spradling offered Senate Amendment No. 2, which was read:

SENATE AMENDMENT NO. 2.

"Amendment Senate Committee Substitute for Senate Bill No. 65, page 4, section 4, lines 1 through 8, by striking all of said lines and inserting in lieu thereof the following:

"'Section 4. Every hearing held pursuant to this act shall be public and a permanent record taken of all testimony received. The Administrative Hearing Officer shall conduct the hearing and the Commissioner may make the determination from the record.'

"Senator Spradling moved that the above amendment be adopted.

"Which motion prevailed."

This amendment was included in the Perfected Senate Committee Substitute for Senate Bill No. 65 and passed with the provision in the form which gave rise to your question.

We must be governed by what the legislature wrote. It is apparent that the legislature did empower the person who occupies the Office of the Administrative Hearing Commissioner pursuant to Section 161.252, RSMo Supp. 1967, to conduct the hearings.

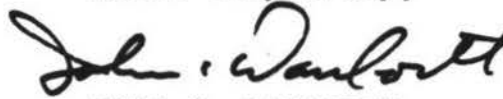
Mr. Dexter D. Davis

CONCLUSION

It is therefore the opinion of this office that hearings to organize Commodity Merchandising Councils authorized by Senate Bill No. 65, 75th General Assembly, shall be conducted by the person holding the office of Administrative Hearing Commissioner who has been appointed by the Governor with the advice and consent of the Senate pursuant to Section 161.252, RSMo Supp. 1967, and that the Commissioner of Agriculture is empowered to make the determination from the record taken of the testimony received at the hearing.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

December 19, 1969

OPINION LETTER NO. 512

Mr. Gene Sally, Director
Department of Community Affairs
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Sally:

This is in answer to your request for an opinion from this office upon the following question:

"'Is a municipal housing authority, organized under the provisions of Chapter 99 of the Revised Statutes of Missouri, included under the provisions of House Bill No. 2, First Extraordinary Session of the Seventy-fifth General Assembly?'"

House Bill No. 2 provides:

"Section 1. Section 108.170, RSMo Supp. 1967, is repealed and one new section enacted in lieu thereof, to be known as section 108.170, to read as follows:

"108.170. Other provisions of law to the contrary notwithstanding, any and all bonds including revenue bonds hereafter issued under any law of this state by any county, city, town, village, school district, educational institution, drainage district, levee district, nursing home district, hospital district, library district, road district, fire protection district, water supply district, sewer district, special authority created under Section 64.920, RSMo, authority created pursuant

Mr. Gene Sally

to the provisions of Chapter 238, RSMo., or other municipality, political subdivision or district of this state shall be negotiable and may bear interest at a rate not exceeding six percent per annum, and may be sold, at any sale pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof, anything in any proceedings heretofore had authorizing such bonds or in any law of this state to the contrary notwithstanding. Such aforementioned bonds may bear interest at a rate not exceeding eight percent per annum if sold at public sale after giving reasonable notice of such sale, at the best price obtainable, not less than ninety-five percent of the par value thereof. Industrial development revenue bonds may, however, be sold at private sale and bear interest at a rate not exceeding eight percent per annum if sold pursuant to any law applicable thereto, at the best price obtainable, not less than ninety-five percent of the par value thereof.

"Section A. Because many political subdivisions of this state have found it extremely difficult and, in many cases, impossible to sell their bonds at six percent interest on the bond market and consequently are unable to build or maintain public utilities and services necessary to the health, safety, and well-being of their citizens, this act is deemed necessary for the immediate protection of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval."

Section 99.080, RSMo 1959, provides that a municipal housing authority shall constitute a municipal corporation, exercising public and essential governmental functions. Also, enclosed is a copy of Opinion No. 394, issued to the Honorable Thomas A. Walsh on November 2, 1967, which holds that the St. Louis Housing Authority is a "public body" within the meaning of Section 105.500, RSMo Supp. 1967. In arriving at this conclusion, the opinion finds that a housing authority is both a municipality and a political subdivision of this state for certain purposes. This being so, it is our view that House Bill No. 2 was meant to apply to municipal housing authorities as well as the other political subdivisions listed.

Mr. Gene Sally

However, before the provisions of House Bill No. 2 can be applied by municipal housing authorities, certain inconsistencies between the bill and Section 99.150, RSMo 1959, must be resolved. Section 99.150 provides:

"1. Bonds of an authority shall be authorized by its resolution and may be issued in one or more series and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates, not exceeding six per cent per annum, be in such denomination or denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution, its trust indenture or mortgage may provide.

"2. The bonds shall be sold at not less than par at public sale held after notice published once at least five days prior to such sale in a newspaper having a general circulation in the area of operation and in a financial newspaper published in Kansas City or in the city of St. Louis, provided, that such bonds may be sold to the federal government at private sale at not less than par and, in the event less than all of the bonds authorized in connection with any project or projects are sold to the federal government, the balance of such bonds may be sold at private sale at not less than par at an interest cost to the authority of not to exceed the interest cost to the authority of the portion of the bonds sold to the federal government.

"3. In case any of the commissioners or officers of the authority whose signatures appear on any bonds or coupons shall cease to be such commissioners or officers before the delivery of such bonds, such signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if they had remained in office until such delivery. Any provision of any law to the contrary notwithstanding, any bonds issued pursuant to sections 99.010 to 99.230 shall be fully negotiable.

Mr. Gene Sally

"4. In any suit, action or proceedings involving the validity or enforceability of any bond of an authority or the security therefor, any such bond reciting in substance that it has been issued by the authority to aid in financing a housing project to provide dwelling accommodations for persons of low income shall be conclusively deemed to have been issued for a housing project of such character and said project shall be conclusively deemed to have been planned, located and constructed in accordance with the purposes and provisions of sections 99.010 to 99.230."

The Missouri Supreme Court has said:

"Courts will not hold that a later statute repeals an earlier one by implication, nor by an express provision to the effect that it repeals former acts inconsistent with it, unless the inconsistency clearly appears. . . ." Nichols v. Hobbs, 197 S.W. 258, 259 (Mo. 1917)

It is clear that House Bill No. 2 does not repeal Section 99.150 expressly. See Stricklen v. Combe Printing Co., 249 Mo. 614, 621, 155 S.W. 829 (1913), wherein the court said, ". . . If there has been a repeal, then it is one by implication. . . ." when dealing with a statute which provided, ". . . All acts or parts of acts not in conformity with the provisions of this act are hereby repealed. . . ." Therefore, it is necessary to compare the two provisions to see whether or not Section 99.150 has been repealed by necessary implication. House Bill No. 2 provides that any and all bonds issued by any municipality may bear interest at a rate not exceeding six percent per annum with the exception that such bonds may bear interest at a rate not exceeding eight percent per annum if sold at public sale after giving reasonable notice of such sale and that such bonds shall not be sold for less than ninety-five percent of the par value thereof, any law to the contrary notwithstanding. Section 99.150 is directly contrary in two instances in that it provides that bonds issued by a municipal housing authority shall not bear interest at more than six percent and that they shall be sold at not less than par value. To this extent, the two sections are irreconcilable. Further, in view of the legislative pronouncement that the provisions of House Bill No. 2 are to be controlling, any law to the contrary notwithstanding, it is our opinion that the legislature intended for the provisions of House Bill No. 2 to be controlling in those instances where House Bill No. 2 conflicts with other laws. By the same token, it can be said that the legislature

Mr. Gene Sally

did not intend to repeal those laws which are not in conflict. We note the following language of the Missouri Supreme Court in the decision dealing with the conflict between Section 108.170, RSMo Supp. 1967 (the forerunner to House Bill No. 2) and Section 108.080, RSMo 1959, with respect to interest rates:

" . . . In other words, we rule that the re-enactment of § 108.170 in 1965 did by implication repeal the limitation of interest to 4%, as expressed in § 108.080. Otherwise, § 108.080 may stand as written; the only change will be in the permitted rate of interest. The presence in § 108.170 of the words: 'anything * * * in any law of this state to the contrary notwithstanding,' confirms us in this view. That expression was not new in the re-enactment, but its inclusion, then and previously, is some evidence of an intent to make the section controlling as to all political subdivisions. . . ."
Edwards v. St. Louis County, 429 S.W.2d 718, 722 (Mo. en banc 1968)

Therefore, it is our view that those provisions of Section 99.150 which are irreconcilable to the provisions in House Bill No. 2 are repealed by necessary implication.

It is the opinion of this office that a municipal housing authority, organized under the provisions of Chapter 99 of the Revised Statutes of Missouri, is included under the provisions of House Bill No. 2 of the First Extraordinary Session of the 75th General Assembly and bonds issued by said authority may be sold at not less than ninety-five percent of par and may bear interest at a rate not exceeding eight percent if sold at public sale pursuant to the notice qualifications of Section 99.150, subsection 2, RSMo 1959.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 394
11-2-67, Walsh

CITIES, TOWNS AND VILLAGES:
CITY OFFICERS:

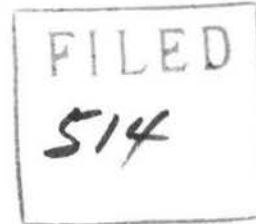
There is no statutory requirement that appointed police officers in third

class cities governed by provisions of Chapter 77, RSMo 1959, be residents of such city, but such cities may by ordinance require residence or other qualifications in addition to those prescribed by statute. An existing ordinance requiring such residence is not rendered invalid or ineffective by a statutory amendment permitting the employment of nonresident police officers.

OPINION NO. 514

November 25, 1969

Honorable Ronald M. Belt
Representative - 96th District
1015 North Jackson
Macon, Missouri 63552



Dear Mr. Belt:

This official opinion is issued in answer to your recent letter in which you ask whether a city of the third class governed by provisions of Chapter 77, RSMo 1959, may employ non-residents as policemen, when the city ordinances require that all persons appointed to office shall have been residents of the city for a specified time.

Section 77.380, Senate Bill No. 15, Seventy-Fifth General Assembly, applies to cities of the third class and provides in part as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and, except the city sextons, the city attorney in cities of less than three thousand inhabitants, appointed police officers, and other employees having only ministerial duties, must be residents of the city. . . ."
[Emphasis ours]

Section 77.380 was first amended in 1967. Laws 1967, p.159. Prior to such amendment only "city sextons" were excluded from the residence requirements. The 1969 amendment added city attorneys in cities of less than three thousand population to those exempt from the residency requirements.

We understand, however, that a particular city has an ordinance which provides that "every person elected or appointed to any office under the city government . . . shall have been a resident of the city . . . for one year next preceeding his election or appointment." We assume that this ordinance was in force at the time of the 1967 statutory amendment to Section 77.380 when "appointed police officer" were first exempted from the residency requirement.

The definitions of the words "officer" and "office" show some variation but it would appear that a city policeman is an "officer" who holds an "office" as those terms are used in Section 77.380, both in its present form and in the form in which it existed prior to 1967. Such a construction is supported both by the exclusion of police officers in the 1967 amendment, and by the exclusion of only the "city sextons" in the statute prior to 1967.

It is also reasonable to assume that the terms "officer" and "office" in an ordinance defining the qualifications of city officers are used in the same sense that they are used in the statutes prescribing qualifications. The tenor of the ordinance in question, then, is to require that police officers have been residents of the city for one year.

The statute prescribes minimum qualifications, but we see no reason why the city may not prescribe additional qualifications of age, residence or education, by ordinance. The ordinance in question goes beyond the statute in its present or its earlier form in requiring not only that city officers be residents, but that they have been residents for a specific period. The specification of additional qualifications is one the city has the authority to make.

The provisions of Section 77.380, Senate Bill No. 15, Seventy-Fifth General Assembly, merely permit the employment of nonresident policemen. The section does not preclude the imposition of additional qualifications, nor does it operate to render an existing ordinance which prescribes additional qualifications ineffective.

If the city proposes to take advantage of the amendment of Section 77.380 by employing nonresident policemen, it should amend or repeal the ordinance prescribing qualifications for persons appointed to office.

CONCLUSION

There is no statutory requirement that appointed police officers in third class cities governed by provisions of Chapter 77, RSMo, be residents of such city, but such cities may by ordinance require residence or other qualifications in addition to

those prescribed by statute. An existing ordinance requiring such residence is not rendered invalid or ineffective by a statutory amendment permitting the employment of nonresident police officers.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

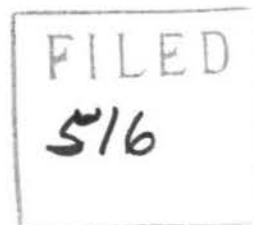
JOHN C. DANFORTH
Attorney General

CITIES, TOWNS AND VILLAGES:
CITIES OF FOURTH CLASS:
POLICE:
RESIDENCE:

A person may be appointed as a
policeman in a fourth class city
who is not a resident of such city.

OPINION NO. 516

December 23, 1969



Honorable David H. Jackson
Prosecuting Attorney
St. Clair County
Osceola, Missouri 64776

Dear Mr. Jackson:

This is in response to your request for an opinion from this
office as follows:

"Would you please furnish me with an
Attorney General's opinion concerning
whether there is a residency requirement
for the city police chief of a fourth
class city who is appointed by the
Mayor and City Council. Also, if
there is a residency requirement,
what that requirement is."

Osceola is a fourth class city.

Section 79.250 Senate Bill No. 15 of the Seventy-fifth General
Assembly, Missouri Legislative Service 1969 pamphlet No. 1 p. 29,
which applies to fourth class cities provides as follows:

"All officers elected or appointed to
offices under the city government shall
be qualified voters under the laws and
constitution of this state and the or-
dinances of the city except that ap-
pointed police officers, the city at-
torney, and other employees having only

Honorable David H. Jackson

ministerial duties need not be registered voters of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed police officers, the city attorney, and other employees having only ministerial duties, shall be residents of the city."

Section 79.250 RSMo 1959 provided no person should be elected or appointed to any office in a fourth class city who is not a qualified voter and a resident of the city. This section was repealed and reenacted by the General Assembly in 1967 by RSMo Supp. 1967, by excepting appointed police officers and other employees having only ministerial duties from the voting and residency requirements of Section 79.250 RSMo 1959. The General Assembly in 1969; Senate Bill No. 15, V.M.A.S. Legislative Service, pamphlet No. 1 p. 29, repealed and reenacted Section 79.250 by also exempting the city attorney from the voting and residency requirements.

In *Mummel v. Thomas*, 181, S.W.2d 168, in construing a statute the court said:

"To get at the true meaning of language employed in a statute, we must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made." *Pembroke v. Huston*, 180 Mo. 627, loc.cit. 636, 79 S.W. 470, 471; *Young v. Hudson*, 99 Mo. 102, 12 S.W. 632. We should also consider the results of the construction suggested, it being presumed that the Legislature intended a reasonable construction which will permit of beneficial results. *Darlington Lumber Co. v. Missouri Pacific R. Co.*, 216 Mo. 658, loc.cit. 672, 116 S.W. 530.

"Prior to the enactment of this section administration of an estate could only be closed out after all assets were liquidated, or distributed in kind. No doubt it was to correct this condition that the section was enacted. *Rutledge v. Simpson's Adm'r*, 141 Mo. 290, 42 S.W. 820, loc.cit. 821."

Honorable David H. Jackson

It is a matter of common knowledge at the present time that law enforcement officials must have scientific and specified training in order to properly perform their duties as police officers. Frequently, persons with such qualifications do not reside within the city. Undoubtedly, this condition prompted the legislature to eliminate the residency qualifications for appointed police officers in fourth class cities so that qualified persons could be appointed to fill such important positions without being residents of such city.

CONCLUSION

It is the opinion of this office that a person who is not a resident of a fourth class city may be appointed chief of police of such city.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

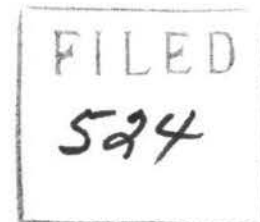
JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

December 19, 1969

OPINION LETTER NO. 524

Dr. Walter C. Daniels, President
Lincoln University
820 Chestnut Street
Jefferson City, Missouri 65101



Dear Dr. Daniels:

This is in response to a request for an opinion from your Administrative Assistant, Mr. Arthur E. Pullam, with respect to some property known as the Dalton Vocational School and accompanying land located in Chariton County, Missouri, said property being under the control of the Board of Curators of Lincoln University pursuant to Section 175.070, RSMo Supp. 1967. Specifically, the opinion request inquires as to the authority of Lincoln University to sell, lease or convey this property and whether public notice would be required in order to do so.

Section 175.070, RSMo Supp. 1967, provides:

"The board of curators for Lincoln University shall take over and conduct the demonstration farm and agricultural school as now established at Dalton, Missouri, and the supervision and control of the school is hereby invested in the board of curators for the Lincoln University."

Section 175.040, RSMo 1959, incorporates the provisions of Section 172.020, RSMo 1959, and thereby empowers the Board of Curators at Lincoln University to "take, purchase and to sell, convey and otherwise dispose of lands and chattels." In addition, the legislature in 1957, by special enactment, provided:

"The board of curators of Lincoln University by and with the approval of the governor may convey by appropriate deed to any state agency designated by the governor the land and property acquired pursuant to section 128 of an

Dr. Walter C. Daniels

act of the Fifty-Second General Assembly, found at Laws 1923, page 11, for a demonstration farm and agricultural school for the Negro race at Dalton, Missouri. If the property is not conveyed to a state agency within two years after this act becomes effective it may be sold and conveyed by appropriate deed by the board of curators on the most advantageous terms obtainable and the proceeds therefrom shall be deposited in the state treasury to the credit of the General Revenue fund."

Based on the above statutory authority, it is our opinion that the Board of Curators of Lincoln University has full legal power to sell and convey the Dalton School property on the most advantageous terms obtainable, whether such sale be public or private.

With respect to leasing the Dalton Vocational School property, enclosed are copies of two opinions issued by this office in which we found two specific leasing arrangements for the Dalton Vocational School property to be within the authority of the Board of Curators of Lincoln University and therefore proper, Opinion No. 21, issued April 12, 1956 to the Honorable Earl E. Dawson and Opinion No. 154, issued August 5, 1966 to the Honorable W. D. Hibler, Jr. Although approval by this office of any proposed leasing arrangement would necessarily depend upon evaluation of the particular facts and circumstances involved, it has been our general position that the Board of Curators of Lincoln University is legally empowered to lease the Dalton Vocational School property at the best terms obtainable, whether this be done privately or by public notice.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 21
4-12-56, Dawson

Op. No. 154
8-5-66, Hibler

December 16, 1969

LETTER OPINION NO. 525

Honorable N. William Phillips
Prosecuting Attorney
103 North Market Street
Milan, Missouri 63556



Dear Mr. Phillips:

This opinion is in response to your question asking whether the provisions of Senate Bill 165 of the 75th General Assembly relating to an increase in compensation for sheriffs of counties of the third class for additional duties imposed upon them in filing a report on the conditions of the county jail apply to such counties not having a county jail.

The pertinent portion of Senate Bill 165 now Section 57.407 is in part as follows:

"1. The sheriff in counties of the third class shall on January first of each year and every three months thereafter file with the circuit court of the county a report on the conditions of the county jail, the number of prisoners confined in the jail, together with recommendations relating to its operation.

"2. In addition to the salary, travel expenses, reimbursement expenses, and any other compensation now provided by law, the sheriff in each county of the third class, for the performance of these duties, shall receive the following sums per year: In counties having a population of less than seven thousand five hundred, the sum of six thousand eight hundred dollars; in counties having a population of seven thousand five hundred and less than ten thousand, the sum of seven thousand one hundred dollars; in counties having a population

Honorable N. William Phillips

of ten thousand and less than eleven thousand five hundred the sum of seven thousand four hundred dollars; in counties having a population of eleven thousand five hundred and less than fifteen thousand, the sum of seven thousand seven hundred dollars; in counties having a population of fifteen thousand and less than twenty-four thousand, the sum of seven thousand nine hundred dollars; in counties having a population of twenty-four thousand and less than thirty thousand, the sum of seven thousand eight hundred dollars; and in counties having a population of thirty thousand and more, the sum of seven thousand five hundred dollars, payable in twelve equal monthly installments out of the county treasury, by warrants drawn by the county court upon the county treasury.

"3. In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process.

"4. Notwithstanding other provisions of this section the total compensation of sheriffs of counties of the third class with an assessed valuation of less than twenty million dollars shall not exceed ten thousand dollars excluding mileage."

In our Opinion No. 387 to Robert B. Paden, dated October 9, 1969, copy enclosed, we held that the increase provided was effective October 13, 1969.

In State v. Carpenter, 388 S.W.2d 823 (1965), the Supreme Court of Missouri, en Banc, held that the fact that an officer does not perform all or any of the duties of the office does not affect his right to the salary attached thereto unless the statutes provide otherwise. Here there is no contrary provision.

In that case the Court considered whether county school superintendents could receive compensation as supervisors of transportation and for preparation of budgets even in those counties where said superintendents have no duties with respect to transportation or budgets. The rule laid down by the Court was clear in holding that the legislature has the right to fix the amount of the salary of such officer and no one else has the authority to change it

Honorable N. William Phillips

either before or after it becomes due and payable.

We are, therefore, constrained to hold that the salary provisions of Senate Bill 165 apply to present and future incumbents and that such officers are entitled to the increase in salary even though the county in which they hold office may have no jail.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 387, Paden, 10/9/69

REAL ESTATE COMMISSION:

The Secretary of the Missouri Real Estate Commission is prohibited from engaging in the real estate practice.

OPINION NO. 536

December 19, 1969



Mr. Robert T. Leonard, Chairman
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri 65101

Dear Mr. Leonard:

On November 21, 1969, this office received an opinion request from you asking us to interpret ". . . the legal intent of the language contained in RSMo. 339.120 as pertaining to the following language: 'He (Secretary) shall devote full time to the position'."

It is our understanding that the present Secretary of the Missouri Real Estate Commission is engaged in the real estate practice. We assume this fact in our opinion.

Section 339.120, RSMo Supp. 1967, reads in part as follows:

" . . . The commission may do all things necessary and convenient for carrying into effect the provisions of this chapter, and may from time to time promulgate necessary rules and regulations compatible with the provisions. . . . The commission shall employ a secretary and such other employees as it shall deem necessary to discharge the duties imposed by the provisions of this chapter. . . ."

The Missouri legislature authorized a secretary to discharge the duties imposed by the provisions of Section 339.120 RSMo Supp. 1967, in that the commission members are not directed to spend full time in discharging the provisions of said chapter.

As noted in the opinion request, Section 339.120, RSMo Supp. 1967, requires the secretary to "devote full time to the position". In Board of Education of London Ind. Sch. Dist. v. Miller, Ky., 299 S.W.2d 626,

Mr. Robert T. Leonard

petitioner instituted a mandamus proceeding to have the Board of Education accept the recommendation of the school superintendent, that petitioner be employed for the school year as both clerk and attendance officer. The Court noted that K.R.S. §159.140(1) is determinative of the issue raised by petitioner. K.R.S. §159.140(1) requires that the attendance officer shall "Devote his entire time to the duties of his office; . . ." The Court in construing that provision stated l.c. 628:

" . . .The Legislature may provide that a public officer devote his entire time to his duties, whether or not the entire time of the officer is in fact required for the complete and faithful performance of his duties. Miller v. Walley, 122 Miss. 521, 84 So. 466. Our Legislature has so directed in the case of attendance officers. Regardless of where the equities may lie here, the statute speaks plainly, and its provisions are mandatory. Opal has no legal right to retain her employment in direct contravention of an express statutory provision."

In State ex rel Gray v. Miller, 105 S.W. 272, 206 Mo. 541 l.c. 541 the Supreme Court of Missouri stated:

"It is fundamental and one of the cardinal rules in the construction of statutes that the true intent and meaning of the lawmaking authority, as expressed in the language employed, should, if possible, be ascertained and declared. On the other hand, it is equally well settled that words and phrases shall be taken in their plain or ordinary and usual sense, and that it is incumbent upon the courts to construe a statute as written, without regard to the results of the construction, or the wisdom of the law as thus constructed. . . ."

In light of the above, it seems clear that the secretary of the Missouri Real Estate Commission must not engage in the real estate practice. To interpret "He shall devote full time to the position", in a different manner would be contrary to the plain, ordinary and usual meaning of the words.

Mr. Robert T. Leonard

It is also felt that there is another strong and compelling reason for this conclusion. In State v. Cumpton, 240 S.W.2d 877 Mo., the Court quotes with approval from 43 Am. Jur. 81, Public Officers, §266:

"A public officer owes an undivided loyalty to the public whom he serves and he should not place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting other than in the best interest of the public. . . ."

The Secretary of the Missouri Real Estate Commission is responsible as the agent of the Commission to discharge the duties imposed by the provisions of Chapter 339 RSMo. Chapter 339 RSMo. contains the body of law which regulates and limits the activities of real estate brokers and salesmen licensed to do business in Missouri. Under that law, the Secretary of the Commission is responsible for processing complaints by private persons or business entities against the acts of real estate brokers or salesmen. A person charged with this responsibility should not be a practicing realtor in that the opportunity would exist for him to quash a complaint against himself or strongly influence the handling of such a complaint. The Secretary of the Missouri Real Estate Commission must not place himself in a position which will tempt him to act in a manner contrary to the public interest. We are certain that the legislature anticipated this conflict and that the requirement to spend full time is reflective of a legislative intent to avoid possible conflicts.

In light of the above reasons, it is our opinion that the Secretary of the Missouri Real Estate Commission is prohibited from engaging either directly or indirectly in the real estate practice.

CONCLUSION

It is therefore, the opinion of this office that Section 339.120 RSMo Supp. 1967, and the conflict of interest law prohibits the Secretary of the Missouri Real Estate Commission from engaging either directly or indirectly in the real estate practice.

The foregoing opinion, which I hereby approve, was prepared by my assistant Alfred C. Sikes.

Yours very truly,



JOHN C. DANFORTH
Attorney General

MENTAL ILLNESS:

PROBATE COURT:

DIVISION OF MENTAL HEALTH:

Under Sections 202.805 and 202.807 of House Bill 43 of the 75th General Assembly, (1) An indigent patient is entitled to an attorney and the

attorney is entitled to a reasonable fee for his services which fee is assessed as a cost to be paid by the county of residence regardless of whether or not the proceedings are held in the county of residence or in the county wherein the facility is located.

(2) Commitment proceedings instituted under Section 202.807 pursuant to and as prescribed by Section 202.805 are to be held in the county wherein the facility is located unless the patient applies to have said proceedings transferred to the jurisdiction of the probate court of his county of residence as defined in Section 202.010.

OPINION NO. 537

December 2, 1969

Honorable Zane White
Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401



Dear Mr. White:

This opinion is in response to your request concerning an interpretation of certain provisions of House Bill 43 of the 75th General Assembly (V.A.M.S. Act No. 79).

Specifically your questions are as follows:

"Section 202.805 laws of 1969 provide . . . 'the head of the facility shall notify the Probate Court of the County wherein the facility is located' . . . Section 202.807 subsection 4, laws of 1969. . . 'it is provided that if the patient is not represented by an attorney, the Court shall appoint one and if the patient is unable to pay an attorney fee, the fee shall be assessed as costs and paid by the County . . . '

"QUESTION 1. Would the County responsible for the attorney fees and costs be the county of residence as defined in section 202.010, laws of 1969? Or would it be the county wherein the facility is located?

"QUESTION 2. In the event of a temporary or emergency committment from a county in which the facility was not located would subsequent proceedings on involuntary committment be in the county wherein the

Honorable Zane White

facility is located or in the county of residence as defined in section 202.010 or in the county from which the patient was sent for emergency or temporary care and treatment?"

In answer to your first question, Section 202.805 of the bill provides in full as follows:

"1. Within ten days after the admission of any person under the provisions of section 202.800, or 202.803 the head of the facility shall notify the probate court of the county wherein the facility is located of such patient. The notification shall contain the full name of the patient, his address, manner of admission, the name of his next of kin, spouse or guardian, and such other information concerning the patient as may be necessary.

"2. Upon receipt of the notice the judge shall note it on his docket and if no proceeding is instituted under section 202.807 by any person authorized to do so within five days, he shall order the patient's release. The head of the facility upon receipt of the order of release shall release the patient immediately.

"3. If the proceeding under section 202.807 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 202.807 be performed before the hearing. The court may order the temporary confinement continued until the rendition of judgment in the proceeding, but the judgment shall be rendered not later than five days after the end of the hearing."

The pertinent sections of Section 202.807 relative to the judicial procedure for involuntary hospitalization provide:

"4. The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not

Honorable Zane White

be bound by the rules of evidence. If it is found that the proposed patient is not represented by an attorney, the court shall appoint an attorney to represent him, and if it is further found that the patient is unable to pay an attorney's fee for services rendered in the proceedings, the court may allow a reasonable attorney's fee for the services which fee shall be assessed as costs and paid by the county together with other costs in the proceedings.

* * * * *

"9. If the hearing arising out of section 202.790, 202.800, 202.803, or 202.805 is in a court not of the county of residence and the patient makes application that the hearing be held in his county of residence, the court shall order the proceedings with all papers, files, and transcripts of the proceedings to be transferred to the probate court of the county of residence.

"10. Any fees of all services required of the probate judge, clerk or court for which reimbursement has not otherwise been made shall be paid at the expense of the county of residence."

As can be seen from the above cited sections, Section 202.805 requires that the head of the facility notify the probate court of the county wherein the facility is located. The proceedings for involuntary hospitalization initiated and held under Section 202.807 of the bill require, among other things, that a person be represented by an attorney and that if such person is unable to pay an attorney's fee for services rendered the court may allow reasonable attorney's fees for the services which fees shall be assessed as costs and paid by the county together with other costs in the proceedings.

The provisions of Paragraph 10 of Section 202.807 of the bill provide that any fees of all services required of the probate judge, clerk or court for which reimbursement has not otherwise been made shall be paid at the expense of the county of residence.

In our view it was the legislative intent that all such costs incurred, including attorney fees for indigent patients, be at the expense of and paid by the county of residence.

In answer to your second question, the jurisdiction is either in the probate court in which the facility is located or in the

Honorable Zane White

probate court of the county of residence as defined. As we have stated, Section 202.805 of the bill requires that the superintendent notify the probate court of the county where the facility is located of the patient's hospitalization; and after that, proceedings must be instituted under Section 202.807 of the bill or the patient released.

While Paragraph 1, Section 202.807 merely refers to "the probate court", it is clear in reading it in context with Section 202.805 that it means the probate court wherein the facility is located or the probate court of the county of residence.

When the cause is placed on the docket of the probate court of the county wherein the facility is located under Section 202.805 and proceedings thereafter timely instituted pursuant to Section 202.807, the jurisdiction remains in such court for the purpose of the involuntary hospitalization proceeding unless application is made by the proposed patient under Paragraph 9 of Section 202.807 to have the cause transferred to the probate court of his county of residence.

CONCLUSION

It is therefore the opinion of this office that under Sections 202.805 and 202.807 of House Bill 43 of the 75th General Assembly that:

(1) An indigent patient is entitled to an attorney and the attorney is entitled to a reasonable fee for his services which fee is assessed as a cost to be paid by the county of residence regardless of whether or not the proceedings are had in the county of residence or in the county wherein the facility is located.

(2) Commitment proceedings instituted under Section 202.807 pursuant to and as prescribed by Section 202.805 are to be held in the county wherein the facility is located unless the patient applies to have said proceedings transferred to the jurisdiction of the probate court of his county of residence as defined in Section 202.010.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CRIMINAL LAW:

FIREARMS:

CONCEALED WEAPONS:

WEAPONS:

Section 564.630, RSMo Supp. 1967, requires that a retail dealer in firearms purchasing a concealable firearm from another such retail dealer or from a person who is neither a wholesaler nor a manufacturer

must obtain and deliver to the seller a permit authorizing such retail dealer to purchase the concealable firearm.

OPINION NO. 538

December 23, 1969

Honorable Joseph P. Teasdale
Prosecuting Attorney
Courthouse
Independence, Missouri 64050



Dear Mr. Teasdale:

This opinion is in response to your request in which you ask whether concealed weapon permits are required in a sale of a concealable firearm by a person who is not a manufacturer, wholesaler, or retail dealer to a retail dealer who intends to re-sell it, and whether such a permit is required in a sale by a retail dealer of a concealable firearm to another retail dealer who intends to re-sell it.

In this opinion, we will confine ourselves to a discussion of the sale of such property although it must be recognized that the requirements of the statute extend to transactions other than merely the sale.

Section 564.630, RSMo Supp. 1967, provides in part:

"1. No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purpose of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving the weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering the weapon, within thirty days after the issuance thereof, a permit authorizing the person to acquire the weapon."

The language of the above section is clear in that the section excludes only such transactions between a manufacturer or wholesaler

Honorable Joseph P. Teasdale

to or from a wholesale or retail dealer for the purposes of commerce. There is no exclusion for retail dealers who sell such firearms to other retail dealers. Likewise, the statute does not exclude sales by individuals to retail dealers even though such sale is for the purpose of resale by the retail dealer purchaser.

Whether or not a person is a retail dealer or a wholesale dealer is a question of fact and must be determined by the individual circumstances in each case. The terms "retail", "wholesale" and related terms have acquired certain and definite meanings. 77 C.J.S., Sales 1, p. 580, et seq. Fountain et al v. St. Joseph Water Company, 352 Mo. 817, 180 S.W.2d 28 (1944).

We are not unmindful of the scope of federal legislation dealing with the licensing or regulation of firearms and dealers in firearms. The federal statutes do not affect the construction of the Missouri statutes although the question of whether or not a person is licensed under the federal law may be one matter to be considered in determining whether or not he is a wholesale or retail dealer as the terms are used under the Missouri statutes.

CONCLUSION

It is the opinion of this office that Section 564.630, RSMo Supp. 1967, requires that a retail dealer in firearms purchasing a concealable firearm from another such retail dealer or from a person who is neither a wholesaler nor a manufacturer must obtain and deliver to the seller a permit authorizing such retail dealer to purchase the concealable firearm.

This opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CIRCUIT CLERKS: The circuit clerk of a second class county must keep safe and have readily available for payment \$25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit, so long as the money is readily available for payment. This can be done on the clerk's own initiative or upon consent of both parties by written agreement. The clerk can also invest in other interest-bearing accounts when done pursuant to court order. The clerk can only pay the funds and the interest earned from investment of the funds as directed by the court. The clerk must also adhere to the requirements of Section 483.312, RSMo 1959.

December 31, 1969

OPINION NO. 548

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This is in reply to your request for an official opinion of this office concerning the authority of the circuit clerk of a second class county to place in interest-bearing accounts a \$25,000 deposit made in a case when the parties have requested that the clerk make such investment.

In your request you have mentioned Section 483.310, RSMo 1959, which authorizes the circuit clerks in counties of the first class to invest funds deposited in court. That section, of course, does not apply here because your question relates to the circuit clerk of a second class county.

26A C.J.S., Deposits in Court, Section 1, says that:

"A deposit in court arises where property or funds are placed in charge of an officer of the court for safekeeping pending litigation, as, for example, until the question as to who is entitled to the possession is determined, or where money is paid into court as security or for some other purpose."

The duty of the clerk regarding such funds is set out in Section 483.075(1), RSMo 1959, where it says that every clerk shall:

Honorable G. William Weier

" * * * keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same."

Subsection 1 of Section 483.025, RSMo 1959, requires every clerk to enter into bond and Subsection 2 says that the bond shall be conditioned that the clerk will:

" * * * faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office,
* * * "

The Supreme Court has said concerning money deposited in court from condemnation proceedings that the clerk held the money in trust. *Snyder v. Cowan*, 120 Mo.389, 25 S.W.382,383; *State ex rel Scott v. Trimble*, 308 Mo.123, 272 S.W.66,71. The Kansas City Court of Appeals has also said that if the clerk received the money in his official capacity then he is an insurer of the fund. *State ex rel. Courtney v. Callaway*, 208 Mo.App.447, 237 S.W.173,176. And, in another case concerning money from a condemnation proceeding the same court said that the clerk received the money by virtue of his office, and it was the clerk's duty to pay the money out under decree of the court. *State ex rel. and to Use of Clinkscales v. Scott*, 216 Mo.App.114, 261 S.W.680,682.

The clerk, then, must pay out the funds when ordered to do so by the court, and the clerk, being a trustee, is entitled to a judgment before paying out the funds. *State ex rel. Scott v. Trimble*, supra S.W.71. This necessitates keeping the funds safe and having them readily available.

Section 558.220, RSMo 1959, originally enacted in 1853, prohibits public officials from "loaning" money which comes to them in their official capacity and reads as follows:

"No officer appointed or elected by virtue of the constitution of this state, or any law thereof, and no officer, agent or servant of any incorporated city or town, or of any municipal township or school or road district, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service, or under color or pretense thereof; and any such officer, agent or servant so loaning such money or valuable security, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than two years or by fine of not less than five hundred dollars."

Honorable G. William Weier

However, under this statute, there is case law permitting "loaning" of money deposited in the registry of the court in two instances.

In *State v. Rubey*, 77 Mo.610 (1883), it was held that a demand deposit in a bank is not a loan as prohibited by Section 558.220, supra. The court, l.c. 620, said that the legislature meant to " * * * discriminate between a deposit in bank for safety and convenience, and an ordinary loan. * * * "

In *State ex rel. Ridge v. Shoemaker*, 278 Mo.138,212 S.W.1, an action was brought against the Circuit Court of Jackson County for interest on a fund deposited in the registry of the court. The fund was deposited as a condition precedent to the relief of specific performance and the clerk merely kept the fund on demand deposit and did not receive any interest on the fund. The court in speaking of Section 558.220, supra, said, l.c. S.W.3, that:

" * * * If the parties to said action had desired said funds loaned, pending said litigation, they should have applied to the court for an order authorizing the loaning of same. They were bound to know, as a matter of law, that the clerk, without such authority, was not authorized to loan said fund."

The court also cited *State v. Rubey*, supra, l.c. S.W.4, in saying the clerk had the right to put funds in a bank on demand deposit.

The purpose of Section 558.220 and related sections is to compel the officer to look to the security of the funds in selecting a depository and "not to his own emolument." Although Section 558.220, RSMo 1959, was not discussed, the holdings in *City of Fulton v. Home Trust Co.*, 78 S.W.2d 445 (Mo.1934); *In re Hunter's Bank of New Madrid*, 30 S.W.2d 782 (Spr.App.1930), and *City of Aurora v. Bank of Aurora*, 52 S.W.2d 496 (Spr.App. 1932), recognize that the deposit of funds in a demand deposit is not precluded by Section 558.220, RSMo 1959.

Unless there is a specific agreement to the contrary, a deposit in a bank is presumed to be a general deposit establishing a relationship of debtor-creditor. *Security Nat. Bank Savings & Trust Co. v. Moberly*, 101 S.W.2d 33 (Mo.S.Ct.1936); *Cassell v. Mercantile Trust Company*, 393 S.W.2d 433 (Mo.S.Ct.1965); *First National Bank of Clinton v. Julian*, 383 F.2d 329 (C.A.8,1967), applying Missouri law.

These authorities indicate further that a debtor-creditor relationship is avoided only when a "special deposit" is made and the depositor and the bank agree that the asset deposited may not be used by the bank, but must be kept intact to be returned to the depositor.

Honorable G. William Weier

Since the enactment of the predecessor to Section 558.220, extensive regulations have been enacted governing the banking industry. This office has previously held in Opinion No. 177, dated December 20, 1963, issued to Robert B. Mackey, a copy of which is attached, that county courts in making deposits of county funds are not limited to demand deposits, but may place a portion of the funds in interest-bearing time deposits. Although this opinion was based upon Chapter 110 - - Depositories for Public Funds, certain conclusions reached there are relevant. The writer determined on the basis of Section 362.010, RSMo Supp. 1967, of the banking statute that the sole distinction between "demand deposits" and "time deposits" is that the payment of demand deposits can be legally required within thirty days, whereas time deposits cannot be required within such period. The distinction between "demand deposits" and "time deposits" is of importance since under federal regulation and Section 362.385, RSMo Supp. 1967, it is unlawful for banks to pay interest upon demand deposits. See also the enclosed Attorney General Opinion No. 223, dated October 27, 1969, issued to Senator Don Owens, a copy of which is attached, which held in part that the Director of Revenue, as an insurer of a portion of the intangible personal property tax, may deposit such funds for safe-keeping and that he may, in doing so, deposit such funds in time deposit accounts which draw interest.

It is therefore our opinion that the circuit clerk of a second class county must keep safe and have readily available for payment \$25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit in a bank, so long as the money is readily available for payment. This can be done on the clerk's own initiative, and therefore also upon consent of both parties by written agreement.

It is our further opinion that the clerk can invest, pursuant to proper court order, in other interest-bearing accounts besides time deposits.

Since the clerk can only pay out the funds pursuant to court order, the interest therefore inures to the benefit of the party as directed by the court.

Finally, we call your attention to Section 483.312, RSMo 1959, which applies when there is a deposit in an interest-bearing account.

CONCLUSION

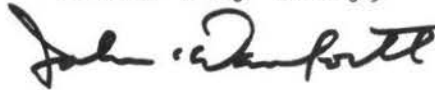
It is the opinion of this office that the circuit clerk of a second class county must keep safe and have readily available for payment \$25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit, so long as

Honorable G. William Weier

the money is readily available for payment. This can be done on the clerk's own initiative or upon consent of both parties by written agreement. The clerk can also invest in other interest-bearing accounts when done pursuant to court order. The clerk can only pay the funds and the interest earned from investment of the funds as directed by the court. The clerk must also adhere to the requirements of Section 483.312, RSMo 1959.

The foregoing opinion which I hereby approve was prepared by my assistant Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Encls:

OP.177-Mackey-1963

OP.223-Owens-1969

COUNTY CLERKS:
DEPUTIES:
DEPUTY COUNTY CLERKS:

Because of the absence of constitutional or statutory provisions requiring that a deputy county clerk be a resident of the county in which he or she serves, it is

permissible for such person to reside in another county in this state.

December 23, 1969

OPINION NO. 552

Honorable Donald L. Gann
Representative - District 146
P. O. Box 302
Ozark, Missouri 65721



Dear Representative Gann:

In your recent opinion request, you asked the following question:

"Please advise me as to whether or not it is permissible for a duly appointed Deputy County Clerk in a Third Class County to continue as such in the event she moves her residence to an adjoining County."

Chapter 51 of the Revised Statutes of Missouri contains legislation pertaining to county clerks. Clearly, the county clerk is required to be a resident of the county in which he is elected. Section 51.050, RSMo 1959. Section 51.450, RSMo 1959, provides, in part:

"The clerk of the county court in each county of the third class is entitled to employ deputies and assistants . . ."

However, no county residency qualifications are established by statute or constitutional provision for these deputies or assistants. Of course, the deputy county clerk could not move to another state and be eligible to continue in her office as

Honorable Donald L. Gann

Article VII, Section 8 of the Missouri Constitution establishes a state residency requirement.

The absence of any statutory or constitutional provisions establishing qualifications for a deputy county clerk in a third class county compels the conclusion that one need not be a resident of the county to be appointed deputy clerk thereof. 20 C.J.S., Counties, Section 102, states:

"In the absence of exceptional circumstances otherwise disqualifying him, qualifications not prescribed by constitution or statute need not be possessed by persons to make them eligible for county offices or positions; but the nominee or appointee must possess the qualifications required by the constitution or applicable statutes."

In this case, there are no constitutional provisions or applicable statutes which require deputy county clerks to be residents of the county in which such officers serve.

CONCLUSION

Because of the absence of constitutional or statutory provisions requiring that a deputy county clerk be a resident of the county in which he or she serves, it is permissible for such person to reside in another county in this state.

The foregoing opinion, which I hereby approve, was prepared for me by my assistant, Peter H. Ruger.

Very truly yours,



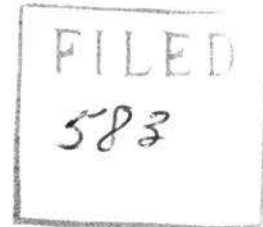
JOHN C. DANFORTH
Attorney General

Answer by Letter (Park)

December 22, 1969

OPINION LETTER NO. 583

Honorable William Y. McCaskill
Superintendent
Division of Insurance
Jefferson City, Missouri 65101



Re: Life Insurance Company of Missouri

Dear Mr. McCaskill:

This letter is written pursuant to your request for an opinion as to whether the Declaration of Intention, Articles of Incorporation and Publisher's Affidavit submitted by the corporators of Life Insurance Company of Missouri and forwarded to this office are in accordance with Chapter 376 of the Revised Statutes of Missouri and not inconsistent with the constitution and laws of this state and the United States.

Section 376.070, RSMo 1959, provides that whenever the corporators of a proposed joint stock life and accident insurance company file a declaration for the purpose of incorporating such company, the superintendent of the insurance division will submit the declaration to the Attorney General for examination, and if it is found by him to be in accordance with the provisions of Sections 376.010 to 376.670 and not inconsistent with the constitution and laws of this state and the United States, he shall so certify and deliver it back to the superintendent.

We have examined the papers delivered to us in the light of pertinent provisions of the constitution and laws of Missouri and the United States, and it has been concluded that the statutory certification required by Section 376.070 cannot be made for the reason that the proposed declaration of intention and articles of incorporation are inconsistent with the constitution and laws of Missouri.

Article IV of the proposed articles of incorporation, in addition to other classes of shares, authorizes the issuance of 60,000 shares of \$1 par value Class A-1 common stock entitled to 1/2 vote per share

Honorable William Y. McCaskill

and 70,000 shares of \$1 par value Class A-3 common stock entitled to 1-1/2 vote per share.

It is our view that the constitution and statutes of Missouri prohibit the creation of stock having multiple votes per share or fractional votes per share.

Article XI, Section 6, of the Missouri Constitution provides:

"In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected, * * * and such directors or managers shall not be elected in any other manner; * * * "

Under the proposed articles of Life Insurance Company of Missouri, in elections for directors a person holding 100 shares of Class A-1 common stock would be entitled to only 50 votes multiplied by the number of directors to be elected, and a person holding 100 shares of Class A-3 common stock would be entitled to 150 votes multiplied by the number of directors. The constitutional provisions require that in this situation each of the shareholders would be entitled to 100 votes multiplied by the number of directors to be elected.

Likewise, Section 375.198, RSMo Supp. 1967 states:

"1. Any capital stock insurance company shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes shall consist of shares with a minimum par value of one dollar, with such designations, preferences, qualifications, limitations, restrictions and such special or relative rights including the right of conversion into any other class of shares as shall be stated in the articles of incorporation; provided, that the authorized number of shares of any class or classes without voting rights shall not exceed in the aggregate a ratio of two shares of such class or classes to one share of the voting stock of the company to be outstanding when the corporation commences business." (Emphasis added)

Thus it is clear that the statute equates shares and votes thereby prohibiting an arrangement authorizing more or less than one vote per share.

Although Chapter 351 of the Revised Statutes of Missouri containing the General and Business Corporation Law of Missouri, does not apply generally to insurance companies (see Section 351.690, RSMo

Honorable William Y. McCaskill

Supp. 1967), it is apparent that the legislators have drawn freely upon those statutes in adopting corporation laws relating to Missouri insurance companies. The counterpart of Section 375.198 of the insurance code is found in the earlier enactment of Section 351.180 of the General and Business Corporation Law. Section 375.201, relating to amendment of charter, bears close resemblance to the earlier statute contained in Section 351.050 of the general corporation code. It should be observed that subsection 2(1)(j) of Section 375.201 contains the same proviso used in Section 375.198 that the ratio of non-voting shares to voting shares shall not exceed two to one.

Implementing the constitutional provision set forth in Article XI, Section 6, the legislature enacted Section 351.245 relating to voting shares and election of directors. In pertinent part this section provides as follows:

"1. Each outstanding share entitled to vote under the provisions of the articles of incorporation shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders.

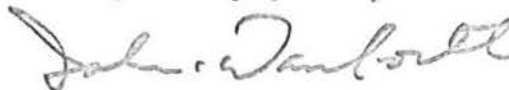
* * *

"3. In all elections for directors of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of voting shares so held by him or her in said corporation, multiplied by the number of directors to be elected at such election, * * * and such directors shall not be elected in any other manner." (Emphasis added)

It is reasonable to conclude that the legislature intended that voting rights of shareholders of joint stock insurance companies should be considered in the same light as the rights of shareholders of general business corporations except where otherwise expressly provided.

As indicated above, for the reasons stated herein the certificate required by Section 376.070, RSMo 1959, cannot be given. The documents forwarded to this office with your letter are returned herewith.

Very truly yours,



JOHN C. DANFORTH
ATTORNEY GENERAL

encls

ELECTIONS:
SECRETARY OF STATE:
REFERENDUM:
INITIATIVE:
PETITIONS:

(1) The signers of a given sheet of a referendum petition are not required to reside in the same congressional district and a signature on a referendum petition would not be invalid because the petition purports to

come from a congressional district in which the signer does not reside; (2) a petition that omits the county in which a signer resides or incorrectly states the county in which a signer resides is not invalid and signatures should not be disqualified on that account; (3) the Attorney General or a prosecuting attorney has no authority to act to prevent the filing of petitions that appear to contain forged signatures; the Secretary of State's function in filing petitions is ministerial and he has no authority to reject signatures that appear forged; (4) those same officials have no authority to ascertain whether or not a copy of the bill to be referred was attached to a referendum petition, and therefore may not act to prevent the filing of a petition on the ground that a copy of the bill allegedly was not attached at the time the petition was circulated; (5) a notary may witness the sworn statement of a circulator when the notary has also signed the sheet of the petition which he notarizes; (6) a notary may notarize petitions in any part of the state in which he has authority to act as a notary, there being no requirement that referendum petitions be notarized in the county in which they are circulated.

OPINION NO. 588

December 31, 1969

Honorable E. J. Cantrell
House of Representatives
306 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Cantrell:

This is in response to your request for an official opinion on the following questions:

"FIRST: Is it in accord with the statutes to assemble names from varying counties or from varying congressional districts on a single petition, and request the Secretary of State to certify said petitions when the language or markings on said petitions indicate the signatures were from varying districts?

Honorable E. J. Cantrell

"SECOND: If the language or markings designating the proper district or county is absent, would these signatures then be valid?

"THIRD: Is there any jurisdiction within the Attorney General's Office, Secretary of State's Office, or County Prosecuting Attorney's Office that would ascertain the authenticity of signatures that give preliminary indications of being forged?

"FOURTH: Would any of these same offices have the authority to ascertain whether or not the petitions signed at the time of signing had the proper matter attached? Again, if there were indications and instances cited that would determine the matter was not attached, could either of these offices take steps to curb the certification of those petitions?

"FIFTH: Under the statutes governing the notaries -- is it lawful for a notary witnessing the sworn statement of the circulator of a petition to sign the same document which he is notarizing?

"SIXTH: Does a notary have the authority to notarize petitions for persons from counties outside their jurisdiction? Or, would a notary from a county where he was commissioned have the authority to notarize a petition from another county which is clearly outside his commissioned territory?"

I

In response to your first and second questions the Missouri Supreme Court held in State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 S.W. 327, 341 342 (1920) that there is no statutory provision which requires that each petition contain signatures from residents of only one congressional district and that when a petition purports to contain signatures of residents of one district, but

Honorable E. J. Cantrell

in fact contains signatures of another district, the signatures should be counted as coming from the district where the signer resides which can be determined from the residence which the signer must list next to his signature.

In those questions you also inquire whether a petition may be filed that incorrectly states the county, or omits all reference to the county, in which a signer or signers reside. Section 126.020, RSMo 1959 reads:

"The following shall be substantially the form of petition for the referendum to the people on any law passed by the general assembly of the state of Missouri:

WARNING

It is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the same measure, or to sign such petition when he is not a legal voter.

PETITION FOR REFERENDUM

To the Honorable, Secretary of State for the state of Missouri:

We, the undersigned, citizens and legal voters of the state of Missouri (and the county of), respectfully order that the senate (or house) bill No., entitled (title of law), passed by the general assembly of the state of Missouri, at the regular (special) session of said general assembly, shall be referred to the people of the state, for their approval or rejection, at the regular (special) election to be held on the day of, A. D. 19-- , and each for himself says: I have personally signed this petition; I am a legal voter of the state of Missouri and county of, my residence and post office are correctly written after my name.

Name, Residence, Post

Honorable E. J. Cantrell

office

(If in a city, street and number.)

(Here follow numbered lines for signatures.)"

Section 126.040, RSMo reads as follows:

"Each and every sheet of every such petition containing signatures shall be verified in substantially the following form by the person who circulated said sheet of said petition, by his or her affidavit thereon and as part thereof:

[illegible]

I, _____, being first duly sworn, say (here shall be legibly written or typewritten the name of the signers of the sheet), signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address and residence correctly, and that each signer is a legal voter of the state of Missouri and county of _____.

(Signatures and post office address of
affiant.)

Subscribed and sworn to before me this _____
day of _____, A. D. 19--.

(Signature and title of officer before whom oath is made and his post office address.)

The forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors." (Emphasis added.)

We note that a petition following the form suggested in those two statutes makes reference to the county in which the signer resides in the locations which we have underlined. Section 126.020, RSMo 1959, requires that the form of the petition be "substantially" similar to the form therein suggested. Section 126.040 provides that the verification form is not "mandatory" and if

Honorable E. J. Cantrell

substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

From those guidelines as to the sufficiency of the petition forms, we are of the opinion that the statutory requirements as to form are to be liberally construed and that if a petition omits a county in which a signer or signers reside, or incorrectly states the county in which a signer or signers reside, the petition would still substantially comply with the statutory form and would not be invalid. We find a petition to be substantially complied with in the above situation because we feel that the county of the signer has no bearing on the substantive provisions of the constitution or statutes relating to the referendum procedure.

II

In response to your third question, we are of the opinion that there is no authority permitting the Secretary of State, Attorney General, or a county prosecuting attorney to make a determination of the validity of signatures that appear to be forged on a referendum petition for the purpose of disqualifying such signatures.

With respect to the Attorney General and a prosecuting attorney, there is no statutory provision which authorizes such officials to make a determination as to which signatures are to be counted in determining if there are sufficient signatures from each of the required number of congressional districts. We believe that the fact that such signatures appear to be forged would not permit such officials to make such a determination. We note that the prosecuting attorney may investigate forged signatures for the purposes of considering criminal prosecution under Section 126.100, RSMo 1959, which makes it a felony to knowingly sign a name other than the signer's own name to a referendum petition.

We find from the holdings of the Missouri Supreme Court that the Secretary of State's function in filing referendum petitions is ministerial. If the petitions appear on their face to be in order, he has no authority to inquire into the possibility that some signatures may have been forged. For example, in State ex rel. Kemper v. Carter, the Supreme Court held:

" We are not saying that the Secretary of State must file a referendum petition upon which either there is not enough congressional districts represented by the signers thereon, or not enough signers from such or any of such districts. But, where prima facie all of these facts appear, he must file the petition as presented to him, and leave to the courts the determination of questions of latent fraud, forgery, and hermetic illegality, for which determination our statutes, it would seem, have provided full and ample machinery for every condition and contingency, and for the protection and safeguarding of both protagonists and antagonists of the act sought to be referred. . . . " 257 Mo. 52, 165 S.W. 773, 781 (1914).

III

You have informed this office that in your fourth question you desire our opinion on two questions: (1) Must a copy of the bill to be referred be attached to the referendum petition at the time the petition is circulated and signed by legal voters; and (2) May the Secretary of State, Attorney General, or a prosecuting attorney take action to prevent the filing of a referendum petition that appears to have been circulated without a copy of the bill to be referred attached?

Answering the second part of the question first, in our opinion the Secretary of State, the Attorney General or a prosecuting attorney has no authority to prevent the filing of a petition that was circulated without a copy of the bill to be referred attached. We base that opinion on the fact that whether or not a copy of the bill was attached at the time that the petition was circulated cannot be determined by examining the petition at the time it is offered for filing. As we pointed out in Section II of this opinion, the Attorney General (or a prosecuting attorney) has no authority to prevent a petition from being filed for any reason. The Secretary of State's function in filing a referendum petition is ministerial and for him to determine that the petition did not contain a copy of the bill to be referred at the

Honorable E. J. Cantrell

time it was circulated would require that he act in a judicial rather than ministerial capacity, and therefore would not be proper.

In answer to the first part of your fourth question, inquiring as to whether the statutes require that a copy of the bill to be referred be attached to a referendum petition at the time that the petition is circulated, there is no decision of the courts in this state in point.

The only statutory section that would be relevant to this inquiry is Section 126.030, RSMo 1959. The relevant parts of that statute are as follows:

" . . . Every such sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition; but such petition may be filed with the secretary of state in numbered sections, for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded, and may be filed in numbered sections in like manner; . . . When any such initiative or referendum petitions shall be offered for filing, the secretary of state, in the presence of the governor and the person offering the same for filing, shall detach the sheet containing the signatures and affidavits and cause them all to be attached to one or more printed copies of the measure so proposed by initiative or referendum petitions; the detached copies of such measure shall be delivered to the person offering the same for filing. . . . "

While the quoted portions of Section 126.030, RSMo 1959, do not expressly hold that a copy of the bill must be attached to a referendum petition at the time such petition is circulated, it could be construed to impose such a requirement.

The Arkansas Supreme Court in Townsend v. McDonald, 42 S.W.2d 410, 184 Ark. 273, (1931) construed an Arkansas statute quite similar to Section 126.030, RSMo 1959, to hold that a copy of the bill must be attached to a referendum petition. In that case, the Arkansas court observed:

"The purpose of the section with regard to petitions for initiative measures is clear. The people could not intelligently act on an initiative measure, unless a copy of the measure itself was before them. The same reasoning would obtain in cases of a measure referred to the people. A full and correct copy of the measure attached to the petition would enable the signer thereto to act intelligently in the premises. Of course, he would not be required to read the measure, but it would be his duty to inform himself of its contents, and this would be a certain way for the signer to know that a different petition would not be presented from that signed by him. The signer would know that he was signing the measure passed by the Legislature, and was not taking the opinion of any one else as to the meaning of it. Otherwise, those in charge of the petition, either designedly or ignorantly, might inform the petitioners that the meaning of the bill proposed to be referred was essentially and substantially different from the one actually passed by the Legislature.
. . . "

On the other hand, the Nebraska Supreme Court construed a statute almost identical to 126.030, RSMo 1959, not to require that a copy of the bill to be referred be attached to the referendum petition at the time the petition is circulated. In that case, State ex rel. v. Amsberry, 104 Neb. 273, 177 N.W. 179 (1920), the court observed:

"Laws to facilitate the operation of the amendment must be reasonable, so as not to unnecessarily obstruct or impede the operation of the law. A law requiring a full copy of a 461-page act to be attached to each sheet would be unreasonable and unnecessarily obstructive. In practice it has never been thought necessary, in submitting a law to the voters, that a full copy of it should be attached to the voter's ballot. Accordingly, section 2340 [Section 126.020, RSMo.] of the act requires the ballot title to contain only an impartial statement of the purpose of the measure to be prepared by the Attorney General. Such legislation, for the purpose of informing a referendum petitioner, may tend to facilitate the operation of the law. The people

Honorable E. J. Cantrell

are conservative. In the absence of fraud, they will be inclined to vote 'no' to a proposition which they do not understand and which purports to change existing laws."

In State ex rel. v. Olcott, 62 Or. 277, 125 P. 303 (1912) the Oregon Supreme Court has construed its referendum clause (Oregon has laws similar to Missouri on initiative and referendum) to hold that a copy of the bill to be referred to the people need not be attached to each separate sheet of the petition if several sheets of the petition are circulated together; it being sufficient if one copy of the bill is attached to several petition sheets circulated together.

In view of the fact that the Missouri Supreme Court has never ruled on whether a copy of the bill to be referred must be attached to each sheet of the referendum petition and that courts of other states have taken conflicting positions on that question, we believe that the question can only be answered by a Missouri court, and therefore, we decline to give our opinion on that question noting that Section 126.050, RSMo 1959, authorizes the raising of that question in court by filing a suit to enjoin the Secretary of State and all other offices from certifying or printing the official ballot on the matter referred.

A final determination by the courts that an injunction should issue would prevent the referendum.

IV

In answer to your fifth question, we find that that question is answered in State v. Sullivan, supra, where the Court held that a notary who attests to the affidavit of the circulator of a referendum petition may also sign the petition on which the affidavit of the circulator which the notary attests appears. The court said at l.c. 283 Mo. 599, 224 S.W. 342:

"A further contention, which affects a few petitions in several of the congressional districts, is that the affidavit of the circulator was made before a notary public, who himself had signed one sheet of the petition. There is nothing in this contention. The notary public, as a voter, signs the petition with other voters. The

Honorable E. J. Cantrell

circulator makes affidavit before such notary that he (naming the notary and the other voters) have signed the petition. This single signer of the petition (the notary public) has no such interest in the matter as would preclude him from administering the oath to the circulator of the petition. Such officer is allowed by law to administer the oath to such a person. We know of no law, either statutory or common, which would make this official certificate bad. The cases cited do not apply."

In response to your last question, there is no law that requires the circulator's affidavit to be attested to in the county where the petition was circulated. By law a notary may notarize documents in the county for which he is appointed, the adjoining counties, and in any or all other counties of the state in which he has previously filed a certified copy of his appointment with the circuit clerk of that county, Section 486.010, RSMo 1967 Supp. The only situation in which a petition would be improperly notarized would be when a notary notarizes the petition in a county where he is not commissioned and which does not adjoin the county in which he is commissioned when he has not previously filed his commission with the county clerk in the county where he is not commissioned.

Honorable E. J. Cantrell

CONCLUSION

It is the opinion of this office that (1) that the signers of a given sheet of a referendum petition are not required to reside in the same congressional district and a signature on a referendum petition would not be invalid because the petition purports to come from a congressional district in which the signer does not reside; (2) a petition that omits the county in which a signer resides or incorrectly states the county in which a signer resides is not invalid and signatures should not be disqualified on that account; (3) the Attorney General or a prosecuting attorney has no authority to act to prevent the filing of petitions that appear to contain forged signatures; the Secretary of State's function in filing petitions is ministerial and he has no authority to reject signatures that appear forged; (4) those same officials have no authority to ascertain whether or not a copy of the bill to be referred was attached to a referendum petition, and therefore may not act to prevent the filing of a petition on the ground that a copy of the bill allegedly was not attached at the time the petition was circulated; (5) a notary may witness the sworn statement of a circulator when the notary has also signed the sheet of the petition which he notarizes; (6) a notary may notarize petitions in any part of the state in which he has authority to act as a notary, there being no requirement that referendum petitions be notarized in the county in which they are circulated.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

December 31, 1969

OPINION LETTER NO. 592

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Wheeler:

Pursuant to the request contained in your letter of December 18, 1969, that this office provide its certification of the proposed Plan of Operation of the Missouri State Agency for Surplus Property for the period January 1, 1970 through June 30, 1975, we have reviewed the plan proposed by the State Board of Education as the State Agency for Surplus Property in Missouri.

Our review of the plan has taken into consideration (1) the Federal Property and Administrative Services Act of 1949, as amended, 63 Stat. 377 (1949), as amended, (2) regulations of the Department of Health, Education and Welfare entitled Minimum Standards of Operation for State Agencies for Surplus Property, 45 C.F.R. 14.1 through 14.15 and (3) Sections 161.192 and 161.202, RSMo 1967 Supp.

From the foregoing, it is the opinion of this office that:

1. The State Board of Education is the "Missouri State Agency for Surplus Property" and is so designated in Section 161.192, RSMo 1967 Supp., and

2. The Missouri State Agency for Surplus Property is authorized to acquire, warehouse and distribute federal surplus property in conformity with the Federal Property and Administrative Services Act of 1949, Public Law 152, Eighty-First Congress, as amended, and under any other laws enacted by the Congress of the United States which provide for the disposal of United States Government surplus property (Section 161.192, RSMo 1967 Supp.), and

Mr. Hubert Wheeler

3. The Missouri State Agency for Surplus Property may enter into agreements for and on behalf of the State of Missouri which are necessary or appropriate under controlling federal statutes and regulations, and may make regulations necessary to the disposal of surplus properties (Section 161.192).

Therefore, we hereby certify that the Missouri State Agency for Surplus Property is authorized and empowered by the law of the State of Missouri to carry out the provisions of the proposed Plan of Operation for the period January 1, 1970 through June 30, 1975.

Very truly yours,

JOHN C. DANFORTH
Attorney General